

EXHIBIT F

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF DELAWARE

3 Case No. 08-12229(MFW)

4 - - - - - x

5 In the Matter of:

6 WASHINGTON MUTUAL, INC., et al.,

7 Debtors.

8 - - - - - x

9 Case No.: 10-53420 (MFW)

10 WASHINGTON MUTUAL, INC. and

11 WMI INVESTMENT CORP.,

12 Plaintiff,

13 v.

14 PETER J. AND CANDANCE R. ZAK

15 LIVING TRUST OF 2001 U/D/O

16 AUGUST 31, 2001, ET AL.,

17 Defendant

18 - - - - - x

19 Adv. Proc. No.: 12-50422 (MFW)

20 WASHINGTON MUTUAL, INC.

21 Plaintiff,

22 v.

23 XL SPECIALTY INSURANCE COMPANY, et al.,

24 Defendants

25 - - - - - x

1 - - - - - x

2 United States Bankruptcy Court

3 824 North Market Street

4 Wilmington, Delaware

5 May 7, 2012

6 10:31 a.m.

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8 B E F O R E :

9 HON MARY F. WALRATH

10 U.S. BANKRUPTCY JUDGE

11 ECR: BRANDON MCCARTHY

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1 Debtors' Twenty-Third Omnibus (Substantive) Objection to
2 Claims;
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4 Debtors' Objection to Proof of Claim Filed by AT&T Corp.;
5
6 Debtors' Sixtieth Omnibus (Substantive) Objection to Claims;
7
8 Debtors' Motion to Estimate Maximum Amount of Certain Claims
9 for Purposes of Establishing Reserves Under the Debtors'
10 Confirmed Chapter 11 Plan;
11
12 Motion for a Protective Order for Claimants Al Brooks, Todd
13 Baker, Deb Horvath, John McMurray, Tom Casey, and David
14 Schneider Pursuant to Rule 26(c);
15
16 Motion of the Official Committee of Unsecured Creditors to
17 Alter or Amend the Court's Opinion and Order Regarding
18 Subordination of the Claim of Tranquility Master Fund, Ltd.;
19
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1 Motion of Washington Mutual, Inc. for an Order, Pursuant to
2 Section 105(a) of the Bankruptcy Code and Rule 9019 of the
3 Federal Rules of Bankruptcy Procedure, Approving Stipulation
4 and Agreement By and Among Washington Mutual, Inc., JPMorgan
5 Chase Bank, National Association and U.S. Bank, National
6 Association, as Successor to Union Bank, N.A. Resolving
7 Adversary Proceeding and Related Proofs of Claim;

8
9 Motion for an Order, Pursuant to Section 105(a) of the
10 Bankruptcy Code and Bankruptcy Rule 9019, Approving the
11 Stipulation and Agreement Between Washington Mutual, Inc.
12 and MSG Media Reducing and Allowing Proof of Claim Number
13 1841;

14
15 Application of (I) Wilmer Cutler Pickering Hale and Dorr,
16 LLP, (II) Pachulski Stang Ziehl & Jones, LLP, and (III)
17 Boies, Schiller & Flexner, LLP for Compensation for Services
18 Rendered and Reimbursement of Expenses as Counsel to the Ad
19 Hoc Group of WMB Senior Noteholders for the Period from the
20 Petition Date Through the Effective Date;

21
22 Washington Mutual, Inc. and WMI Investment Corp. v. Peter J.
23 and Candace R. Zak Living Trust of 2001 u/d/o August 31,
24 2001, et al. (Adversary Proceeding No. 10-53420);
25

1 Debtors' Seventy-First Omnibus (Substantive) Objection to
2 Late Filed Claims;

3
4 Debtors' Seventy-Second Omnibus (Substantive) Objection to
5 Claims;

6
7 Motion of Deutsche Bank Trust Company Americas in its
8 capacities as Indenture Trustee and Guarantee Trustee of Two
9 Series of WMB/CCB Subordinated Notes for Entry of an Order
10 Allowing and Authorizing and Directing Payment of Its Claims
11 for Fees and Expenses;

12
13 Motion of Law Debenture Trust Company of New York, in its
14 capacity as Indenture Trustee, for Entry of an Order
15 Partially Allowing and Liquidating Proof of Claim for Fees
16 and Expenses Incurred from January 1, 2012 through and
17 Including March 31, 2012;

18
19 Motion for an Order, Pursuant to Section 105(a) of the
20 Bankruptcy Code and Bankruptcy Rule 9019, Approving
21 Stipulation and Agreement Between WMI Liquidating Trust and
22 SPCP Group, LLC Reducing and Allowing Proof of Claim Number
23 4048;

24
25

1 Fourth Motion of Wells Fargo Bank, N.A., in its capacity as
2 Successor Indenture Trustee and Successor Guarantee Trustee,
3 for Entry of an Order Further Partially Liquidating and
4 Allowing that Aspect of its Proof of Claim Relating to the
5 Trustee's Fees and Expenses;

6
7 Fourth Motion of Wilmington Trust Company, in its capacity
8 as Trust Preferred Trustee, for Entry of an Order Further
9 Partially, Liquidating and Allowing Proofs of Claim for Fees
10 and Expenses;

11
12 Fourth Motion of The Bank of New York Mellon Trust Company,
13 N.A. in its capacity as Indenture Trustee, for Entry of an
14 Order Further Partially Liquidating and Allowing Proof of
15 Claim for Fees and Expenses;

16
17 Fourth Motion of Wilmington Trust Company, in its capacities
18 as Indenture Trustee and Guarantee Trustee for Five Series
19 of WMB/CCB Subordinated Notes, for Entry of an Order
20 Liquidating and Allowing Proof of Claim for Fees and
21 Expenses;

22
23 MBS Plaintiffs' Motion to Classify Claim as a Claim 12
24 Claim;

25

1 Debtors' Seventieth Omnibus (Substantive) Objection to
2 Claims;

3
4 Debtors' Seventy-Third Omnibus (Substantive) Objection to
5 Late-Filed Claims;

6
7 Debtors' Seventy-Fourth Omnibus (Substantive) Objection to
8 Claims;

9
10 Motion of Examiner for Entry of Order (1) Discharging
11 Examiner; (2) Approving Disposition of Documents; and (3)
12 Granting Related Relief;

13
14 Motion of Gregory G. Camas to Extend Time to File Proof of
15 Claim, Deeming Proof of Claim Timely Filed, and Classifying
16 Claim as Class 12 Claim Under Seventh Amended Joint Plan of
17 Affiliated Debtors Pursuant to Chapter 11 of the United
18 States Bankruptcy Code;

19
20 MBS Plaintiffs' Motion for Order Certifying Class for
21 Purposes of the Class Claim Pursuant to Fed. R. Civ. P. 23
22 and Fed. R. Bankr. P. 7023 and 9014(c);

23
24 Washington Mutual, Inc. v. XL Specialty Insurance Co., et
25 al.;

1 Tenth Interim Fee Applications.

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25 Transcribed by: Sherri L. Breach, CERT*D-397

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4 9 1 3 N o r t h M a r k e t S t r e e t , 1 1 t h F l o o r

5 W i l m i n g t o n , D e l a w a r e 1 9 8 9 9

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7 B Y : C R A I G J . S P R I N G E R , E S Q .

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9 L O W E N S T E I N S A N D L E R

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Good morning.

4 MR. ROSEN: Good morning, Your Honor. Brian
5 Rosen, Weil, Gotshal and Manges. With me is my partner,
6 Adam Strochak and Michael Merchant from Richards, Layton and
7 Finger. We're here on behalf of WMI Liquidating Trust, and
8 I'm guess we'll assume the capacity later on for our own
9 respective law firms, Your Honor.

10 With respect to the agenda, I think we pick up on
11 Page 14, Item Number 11, Your Honor.

12 THE COURT: All right. Just -- just for the
13 record I have had an opportunity to look at the Items 11-19
14 which were filed under certification of no objection.

15 MR. ROSEN: Yes.

16 THE COURT: And I had no problem with any of them
17 and have entered the orders.

18 MR. ROSEN: Okay. Thank you, Your Honor. I
19 think that will allow certain people in the courtroom to --
20 to leave, which would take us then up to, Your Honor, Item
21 Number 20, which Your Honor -- actually, Your Honor, if we
22 could skip to Item 21 just very briefly. There are two
23 other claims on there, if we could get rid of the claims
24 objections first.

25 THE COURT: That would be fine.

1 MR. ROSEN: Okay. Items 21 and 22, Your Honor,
2 Item Number 21 is the seventieth omnibus objection. In this
3 objection we sought to disallow sixty-three claims which had
4 been subordinated to the level of preferred or common stock
5 --

6 THE COURT: Could the operator mute the lines?
7 Thank you.

8 MR. ROSEN: So pursuant to the confirmed and
9 consummated plan, Your Honor, Classes 19 or 22, and these
10 claims have been subordinated pursuant to orders granted --
11 granting the thirty-eighth through the forty-second omnibus
12 objections as well as a few others such as the sixty-second
13 omnibus objection.

14 And, Your Honor, as noted in the objection that we
15 did file here, pursuant to the plan holders of equity
16 interests are now to receive a distribution on account of
17 such equity interests, but the claimants holding the claims
18 on each to this seventieth omnibus have not provided any
19 justification why they should recover any amounts in
20 addition to their equity interests or with respect to the
21 purchases of the equity in the case.

22 And even the few that have asserted anything
23 beyond the mere value of those losses, Your Honor, from
24 holdings have not provided any support for those assertions.
25 So the debtors' respectfully request that the Court disallow

1 each of the claims on that Exhibit A, not because we wanted
2 to get rid of their equity interests, Your Honor, but
3 because we were seeking to avoid a duplicate recovery on
4 behalf of those people that have previously filed these
5 claims.

6 There were six responses, Your Honor, that the
7 debtors' received on or before the deadline, and after that
8 the debtors' submitted under certification of counsel an
9 order which the claim -- excuse me -- the form of which
10 would have removed all of those non-responding ones. And,
11 Your Honor, the Court entered that proposed order on April
12 2nd. So that left us, then, with these six remaining
13 claims.

14 And if I could just briefly go through those, Your
15 Honor, for the record.

16 The first, and I apologize if I mispronounce the
17 name, Mr. Timothy Nguyen and his is Claim Number 3921 for
18 \$100,000, and he said in his papers, "I invested on
19 Washington Mutual for \$100,000. All my retire savings have
20 lost when WM was transferred to Chase. Could you help me to
21 consider my situation? All my supporting documents were
22 lost when I moved from California to Florida." There is
23 nothing else attached to the pleading, Your Honor.

24 Additionally, 3922 of the following claim was
25 filed by Nancy Nguyen. Again, almost the same exact

1 wording. "I invested on Washington Mutual for 22,000 all my
2 retire savings have lost when WM was transferred to Chase.
3 Could you help me to consider my situation? Thank you."
4 She attaches nothing either, Your Honor.

5 Celia Lucente, Claim 3608, for \$545,000 and change
6 says, "I have had taxes withheld on compensation for w-pay"
7 -- I'm assuming work -- "I have performed, but in PD, paid
8 income I was paid in the form of stock. Supporting
9 documentation of brokerage statements for the shares issued
10 and corresponding W2s showing withholdings filed with the
11 proof of claim." There was nothing else filed, Your Honor.

12 Helen Burleson Kelso, Claim 3236, for 9,750, she
13 said in her response, "I oppose the disallowance of my claim
14 that is subject to the objection. My claim was properly
15 filed previously with the claims agent and all supporting
16 documentation was included therewith. My claim was in
17 order. See attached." There's nothing else to the
18 response, Your Honor. The claim itself has only an account
19 statement showing the November 20th, 2007 market value of
20 her stock to be \$9,750.

21 Ms. Adele Plotkin --

22 THE COURT: Well, didn't she also attach her stock
23 certificate?

24 MR. ROSEN: I -- I believe she did. Yes, Your
25 Honor.

1 THE COURT: Okay.

2 MR. ROSEN: Ms. Plotkin said in Claim 1431 and in
3 her response, "I am an eighty-nine-year-old senior citizen
4 and did attend a hearing on objection in 201."

5 THE COURT: Oh, I'm sorry. It's Ms. Plotkin who
6 attached --

7 MR. ROSEN: I -- I think that's right, Your Honor.

8 THE COURT: Okay.

9 MR. ROSEN: She attaches a certificate of 553
10 shares. "But I'm not physically able to attend the hearing
11 on 4/3/12. I do not understand why the debtors' do not
12 consider any settlement to my proof of claim."

13 Mr. Armstrong, Claim Number 263 -- excuse me --
14 2368 filed in the amount of 41,000 and change. This claim
15 asserted that -- the claim arose out of personal injury and
16 that was sufficient for his claim of damages. He said he is
17 no longer a shareholder. His claim relates only to the
18 personal losses "I suffered up to date of filing of this
19 case and the value of my property which was taken by our
20 government, and makes no mention of any equity interests I
21 may have acquired or disposed of since that time."

22 Interestingly, Your Honor, when you look at his
23 day trading, which he did attach, he bought a lot of things
24 several days after the seizure, so -- to help pump up his
25 claim. And we also noted that when you do -- he was a day

1 trader. There's a lot of buying and selling of his claim.
2 We noted that his losses were only in the amount of around
3 \$9,000 from what he did buy and sell.

4 We did actually speak to him and try and get him
5 to be part of the MBL settlement, but we noted that his --
6 his purchases actually were after the commencement -- or
7 excuse me -- after the closing of the class period. He
8 argues Fifth Amendment; that the FDIC should pay him for
9 taking of the bank. He says the bank -- the FDIC told him,
10 no. He should look here. Your Honor, he argues -- he tries
11 to reargue the subordination issue. We have been unable to
12 come up with any reason as to why this should be paid, Your
13 Honor.

14 I do have, in the courtroom, Your Honor, Mr.
15 Maciel. Mr. Maciel and others have testified before as to
16 the effects of WMI versus WMB, the claims process, et
17 cetera, and I could tender or proffer Mr. Maciel at this
18 time if the Court thinks it would be helpful.

19 THE COURT: All right. You may.

20 MR. ROSEN: And, Your Honor, with you already
21 having granted several of these, I will just try and skip
22 over and go to the ones that are relevant.

23 THE COURT: Thank you.

24 MR. ROSEN: Because it would be applicable, I
25 think, to the seven -- perhaps the seventy-three as well.

1 Your Honor, Mr. Maciel is a senior director with
2 Alvarez and Marsal. He was formally the chief financial
3 officer of Washington Mutual, Inc. and WMI Investment Corp,
4 and he's currently the chief financial officer for the WMI
5 Liquidating Trust. He's present in the courtroom today and
6 I make this proffer on his behalf, Your Honor.

7 He would testify that as the CFO of the debtors he
8 was one of the persons responsible for overseeing the claims
9 reconciliation and objection process in these Chapter 11
10 cases. He would testify that in preparation for filing the
11 omnibus claims objections, each of the claims at issue was
12 carefully reviewed and analyzed in good faith using due
13 diligence by the appropriate personnel working under his
14 direction and/or supervision.

15 He would further testify that he has reviewed the
16 omnibus claims objections and the exhibits and is familiar
17 with the information contained therein.

18 With respect to the seventieth omnibus one, those
19 were the six responses we were just referring to, Your
20 Honor, Mr. Maciel would testify that each of the sixty-three
21 claims have been previously objected to and been disposed
22 of.

23 He would testify that pursuant to the seventh
24 amended plan, holders of equity interest have received
25 distributions on account of such equity interests, but the

1 claimants holding the claims in the seventieth have not
2 provided any justification why they should recover amounts
3 in addition to their equity interests or with respect to
4 their purchases of WMI equity.

5 And even the few claimants that have asserted
6 anything beyond the mere value of their losses from the
7 holdings of equity have not provided any support for such
8 assertions, including in their responses to the objection.

9 He would testify that by -- excuse me -- that by
10 this objection the debtors are not seeking to disallow any
11 equity interest held by such claimants, but rather such
12 claimants should not recover additional amounts with respect
13 to the purchases of the equity.

14 That would be his testimony solely with respect to
15 the seventieth, Your Honor.

16 Your Honor, if you would like I could then proceed
17 with what he would say with respect to the seventy-third or
18 we could deal with that later.

19 THE COURT: Well, with respect to those who sold
20 their shares, and I -- I guess it's Mr. Armstrong is the
21 only one --

22 MR. ROSEN: Right.

23 THE COURT: -- who sold his shares, he is not
24 getting a distribution as a shareholder.

25 MR. ROSEN: No, Your Honor.

1 THE COURT: Why is he not entitled to a
2 distribution -- a distribution as a subordinated creditor
3 for his losses?

4 MR. ROSEN: Your Honor, we haven't seen any
5 evidence as to why he should be entitled to it. We've asked
6 him to come forward and show us what that evidence would be.
7 Obviously, he has made allegations in his pleadings with
8 respect to directors and officers, but we haven't seen
9 anything beyond that, Your Honor. He is just claiming gross
10 mismanagement on the part of those directors and officers in
11 allowing the bank to be seized by the government. And then
12 he -- as I said, he turned around and said, my Fifth
13 Amendment rights; the government took it; the government
14 should pay me for the taking of my stock, which at this
15 point only the \$9,000.

16 So, Your Honor, we haven't seen anything from Mr.
17 Armstrong that would warrant anything beyond this. If Mr.
18 Armstrong would step forward and provide us with some sort
19 of evidence as to what we perceive to be the nine-thousand-
20 dollar differential between the day trading bought and
21 selling, we would, obviously, take a serious look at it.

22 THE COURT: All right. Well, I believe Mr.
23 Armstrong is on the line.

24 Mr. Armstrong?

25 MR. ARMSTRONG: Yes. Can you hear me?

1 THE COURT: We can hear you.

2 MR. ARMSTRONG: Okay. Good.

3 First, thank you for taking the time today. And I
4 guess I need to get clarification on something that counsel
5 said because they have not contacted me at all or discussed
6 my claim in any form or fashion. So --

7 THE COURT: Well, just tell me, what is the basis
8 for your claim for damages?

9 MR. ARMSTRONG: It's in two parts. It's -- the
10 first is actual, out-of-pocket losses from Washington
11 Mutual, which is the \$8,305.19.

12 And I'm -- I'm filing an open claim and not just
13 an equity interest because I believe that the management of
14 the company breached a legal duty and grossly mismanaged my
15 assets, you know, to cause me those losses. I believe they
16 have a legal responsibility for that.

17 THE COURT: And did you provide a calculation of
18 your actual losses as part --

19 MR. ARMSTRONG: Yes --

20 THE COURT: And where --

21 MR. ARMSTRONG: -- I did.

22 THE COURT: -- is that?

23 MR. ARMSTRONG: With my original claim.

24 MR. ROSEN: Your Honor --

25 THE COURT: Do you have the --

1 MR. ROSEN: -- if I could approach, I'll help --

2 THE COURT: Yeah. Please hand up the original
3 claim.

4 All right. I'm looking at Exhibit A to your proof
5 of claim and that's the \$9,000.

6 MR. ARMSTRONG: Yeah. That's the summary of it.
7 Correct. And then all the individual trade confirmations
8 follow in Exhibit B.

9 THE COURT: I have those.

10 MR. ARMSTRONG: So Exhibits A and B to the claim
11 are the, you know, detailed support for that eight-thousand-
12 three-hundred-dollar number.

13 THE COURT: All right. And your -- you have
14 another claim you assert you're entitled to?

15 MR. ARMSTRONG: Yeah. The second part of the
16 claim is the value of the 3,800 shares that I owned as of
17 the petition date.

18 THE COURT: And --

19 MR. ARMSTRONG: But, you know, my cost on those is
20 not included in the \$8,300.

21 THE COURT: But you sold those --

22 MR. ARMSTRONG: The --

23 THE COURT: -- you sold those shares after the
24 bankruptcy.

25 MR. ARMSTRONG: After the bankruptcy, yes, ma'am.

1 MR. ROSEN: Your Honor, it's our understanding,
2 and -- and Mr. Armstrong can correct me if I'm wrong, but he
3 -- he's asserting that he's entitled to an imputed loss of
4 \$33,000 because he thinks that the fair value of the stocks
5 should have been \$8.75 per share which was the value that
6 TPG paid in April of 2008. So he has grossed up the amount
7 of his claim.

8 MR. ARMSTRONG: Yes. I -- I used TPG's investment
9 amount.

10 MR. ROSEN: Even though he didn't buy it at that
11 level.

12 MR. ARMSTRONG: Correct. But I've since found out
13 that -- and as I stated in my original claim, I've -- I felt
14 that was probably a very conservative estimate of the value
15 of the -- of the shares. And as it turns out, it was a very
16 conservative estimate and I provided additional information
17 in my response to the seventieth objection that shows the
18 FDIC itself --

19 THE COURT: Well --

20 MR. ARMSTRONG: -- valuing the shares at \$15.50 a
21 piece after -- after the seizure.

22 THE COURT: All right. Well, as -- as a legal
23 matter, I'm going to disallow any claim for stock you sold
24 after the bankruptcy date. That was a voluntary decision
25 made by you and I don't think that entitles you to anything

1 from this estate.

2 MR. ARMSTRONG: Okay. Even if the management of
3 the company caused the value of my asset to basically
4 disappear or vanish --

5 THE COURT: Well --

6 MR. ARMSTRONG: -- prior to the petition date or
7 --

8 THE COURT: Well --

9 MR. ARMSTRONG: I mean, that's really the basis of
10 my whole claim; that I owned -- that I had property of
11 significant value and because of the management of the
12 company, that value was wiped out.

13 THE COURT: Well, but -- but had you held your
14 claim, you would have a claim against the estate for your
15 stock, and you did not. I -- I don't think that anything
16 that occurred after the bankruptcy entitles you to a claim
17 for stock that you voluntarily sold.

18 MR. ARMSTRONG: Oh, I agree with that. But -- but
19 my claim is for the property that I held prior to the
20 bankruptcy.

21 THE COURT: Well, but I think that's incorporated
22 in your nine-thousand-dollar calculation.

23 MR. ARMSTRONG: Actually, no. The \$9,000 or
24 \$8,300, it was actual losses that I had incurred as the
25 value of the stock went down. That does not consider the

1 value of the 3,800 shares that I still held as of the
2 petition date, if that makes any sense.

3 THE COURT: No. I understand.

4 MR. ARMSTRONG: Okay.

5 THE COURT: Well, but to the extent that the --
6 well, let me hear the debtors' argument on this. I mean,
7 I'm struggling to see what the --

8 MR. ROSEN: On the -- on the eighty-three-hundred
9 piece, Your Honor?

10 THE COURT: -- the issue is. Yeah.

11 MR. ROSEN: Your Honor, on the eighty-three-
12 hundred piece --

13 MR. ARMSTRONG: No. She's -- she's talking about
14 the twenty --

15 THE COURT: The two --

16 MR. ARMSTRONG: -- the 33,000 and twenty-two --

17 THE COURT: Yeah. The 2,000 --

18 MR. ARMSTRONG: -- portion in the claim.

19 THE COURT: The losses on the 2,000 shares held as
20 of the petition date.

21 MR. ARMSTRONG: Yeah. The 3,800 shares I held as
22 of the petition date. My claim for the value of those is
23 \$33,022.

24 MR. ROSEN: Your Honor, as I indicated, we tried
25 to break this down into, when we looked at all of the buying

1 and selling and understanding what he -- what Mr. Armstrong
2 bought the shares of stock, and if you noted he was buying
3 them on the same day he was selling them.

4 And we -- we added up and he agrees that there was
5 about an \$8,305 in losses there. This is for the gross-up,
6 though, that he's referring to, this 8. -- times the TPG
7 value. I honestly -- Your Honor, I'm at a loss to
8 understand why there is a relationship back to what TPG paid
9 and he's focusing on the FDIC's papers in some subsequent
10 filing that the FDIC made somewhere to say, geez, look,
11 there was value in that stock.

12 We -- I honestly -- Your Honor, I have a hard time
13 understanding it. I don't understand it and I don't see
14 what the relationship is back to the estate. If there is,
15 in fact, a claim that we should be talking about, it should
16 be limited to the \$8,300, and at that point, then, if Mr.
17 Armstrong wants to come forward and present evidence as to
18 why the \$8,300 qualifies a subordinated claim, then I think
19 that's something, Your Honor, that we can discuss with the
20 Court and, if necessary, litigate and -- and have the Court
21 decide.

22 But just to make a reference to say there was
23 gross mismanagement on the part of the directors and
24 officers and, therefore, pay me \$8,300 or pay me for this
25 impeded value of \$33,000 in addition to that, Your Honor,

1 we're hard-pressed to understand how it's right. He chose
2 to do what he did. He chose to sell the stock. He chose to
3 quantify his loss at the \$8,300.

4 THE COURT: Yeah. Why isn't that correct?

5 (No verbal response)

6 THE COURT: Mr. Armstrong.

7 MR. ARMSTRONG: Oh, I'm sorry. I thought you were
8 asking him.

9 THE COURT: No. I'm asking you why isn't counsel
10 for the debtor correct?

11 MR. ARMSTRONG: Well, as far as the eight-
12 thousand-three-hundred-dollar out of pocket losses is
13 concerned, he is correct. And I can see -- the way the
14 question is by alleging that that was a loss caused by a
15 breach of a legal duty by the former management of the
16 company, is it -- is it a legal and reliable claim. If it
17 is, then I would say that it's a -- you know, it's a claim
18 which precedes the petition date and they've got to pay it
19 or treat it, handle it in -- in the estate, just like any
20 other claim. I -- based on what I've learned, I believe
21 that that would be subordinating, the level of co-owned
22 equity.

23 THE COURT: Yes.

24 MR. ARMSTRONG: And the fact that I sold the
25 shares afterwards, in my mind, is really irrelevant because

1 what my claim is for is, you know, pre-petition losses.

2 THE COURT: Well, I think the debtor is willing to
3 concede \$8,300 in out of pocket losses.

4 MR. ROSEN: Well, Your Honor, I -- I think --

5 THE COURT: As a calculation.

6 MR. ROSEN: As a calculation. That's correct. By
7 no means are we conceding liability.

8 MR. ARMSTRONG: By no means what? Say -- say
9 again, please?

10 THE COURT: They're not conceding that you lost
11 this money because of any bad acts by the debtors or its --

12 MR. ARMSTRONG: Oh, okay. Okay. I guess that's
13 for you to decide then. I really don't know what the -- you
14 know, the legal standard is for proving gross mismanagement.
15 If the fact that we're talking today isn't proof enough,
16 then I don't -- you know, I really don't know what else I
17 can provide. I mean, the bank was a hundred-and-something-
18 year-old bank that survived the Great Depression. It was
19 the sixth largest bank in the country and now we're sitting
20 in a bankruptcy court arguing over an eight-thousand-dollar
21 claim.

22 THE COURT: Well, the problem --

23 MR. ARMSTRONG: In my mind, that -- that's
24 evidence of mismanagement. But --

25 THE COURT: Well, I think it's not quite enough

1 and there are any number of reasons why the stock might have
2 lost value. I mean, I think you have to prove a little bit
3 more than that to prove a loss, even a subordinated loss.

4 MR. ROSEN: Your Honor, if I could make a
5 suggestion. If we could modify the order to carve Mr.
6 Armstrong's claim out of it and then allow Mr. Armstrong an
7 opportunity to submit some evidence, as the Court did
8 previously with some people who had some of the similar
9 types of assertions that he has now, and then we, perhaps,
10 have a hearing set in the future for the eighty-three-
11 hundred-dollar piece.

12 THE COURT: All right. I'm willing to allow that.
13 Mr. Armstrong, I suggest that you talk with counsel for the
14 debtor regarding what proof you can come forward with.
15 Okay.

16 MR. ARMSTRONG: Okay. I'll -- I'll -- I'll gladly
17 do that.

18 THE COURT: All right. I think the other claims
19 are -- are different from yours and I agree that it appears
20 that all they are asserting is really claims for shares,
21 their share ownership.

22 MR. ROSEN: Right.

23 MR. ARMSTRONG: Right.

24 THE COURT: All right. So we'll carve out Mr.
25 Armstrong.

1 MR. ARMSTRONG: Okay. My biggest concern,
2 honestly, is -- is the Fifth Amendment issue.

3 THE COURT: Well, you understand that -- that the
4 taking was by the government, so am I correct that you're
5 asserting a claim against the government for taking of your
6 property, for the seizure of the bank?

7 MR. ARMSTRONG: I believe -- my own -- my own
8 personal belief is that the government is responsible for
9 compensating the owners of that bank. Yes. Unfortunately,
10 I've had a similar situation on -- with -- on another
11 investment of mine and I filed a claim directly with the
12 FDIC. They called it a third party claim, kicked it back to
13 me and said, go talk to the holding company, which is what
14 I'm doing here. I don't understand the logic behind that,
15 but that is what I was instructed. So --

16 THE COURT: Well, I'm -- I'm prepared to find that
17 you do not have a Fifth Amendment claim against the debtor.

18 MR. ARMSTRONG: Okay.

19 THE COURT: I'll disallow that portion.

20 MR. ARMSTRONG: Would it be -- would it be out of
21 your venue, if that's the right word, to give me a ruling
22 that we do have a Fifth Amendment claim against the
23 government?

24 THE COURT: Yeah. I -- that's not -- I don't have
25 jurisdiction or venue to decide that.

1 MR. ARMSTRONG: That's what I was afraid of.

2 Okay. Very good.

3 THE COURT: All right.

4 MR. ARMSTRONG: If the debtors will just contact
5 me on this other, then we'll discuss it.

6 MR. ROSEN: We will, Your Honor. And thank you,
7 Mr. Armstrong.

8 MR. ARMSTRONG: Thank you all.

9 MR. ROSEN: Your Honor, that takes us to the
10 seventy-third omnibus objection, which is Item 22 on the
11 agenda.

12 In this objection, Your Honor, we objected to nine
13 claims on substantive grounds. And Mr. Maciel would testify
14 that each of the proofs of claims listed in this objection
15 had also been previously objected to and disallowed on the
16 basis that they were late filed. But, Your Honor, if you
17 recall, pursuant to the plan we -- we gave them new life.

18 THE COURT: Yes.

19 MR. ROSEN: Mr. Maciel would testify that the
20 debtors have determined that each such claim has been
21 asserted by a party to which the debtors have no legal
22 obligation. He would testify that with respect to certain
23 of these claims, the claimant has attached only an invoice
24 and no case identifying either of the debtors as the
25 recipient of such services, but has not attached a contract

1 from which the claim arises or any other supporting
2 documentation.

3 Nonetheless, the debtors searched the records for
4 any contract that might exist between them and the claimants
5 relating to such services without success, and nothing in
6 the debtors' books and records indicated a liability owed to
7 such claimant.

8 The remainder of the seventy-third omnibus
9 objection claims are miscellaneous claims that improperly
10 seek recovery against the debtors because they arise from
11 mortgages issued by WMB, the bank, and held by the
12 claimants.

13 Mr. Maciel would testify that the only two
14 responses to this objection came from holders of mortgage
15 claims. With respect to such claims, Mr. Maciel would
16 testify that during the period implicated by these claims
17 WMI was a thrift-holding company that never directly engaged
18 in any of the mortgage operations or related activities
19 implicated by such claims. Specifically, WMI never directly
20 originated or serviced any mortgage loan anywhere in the
21 United States or elsewhere. As such, these claims seek a
22 recovery for conduct that is attributable to WMI.

23 Mr. Maciel would further testify that neither of
24 the responses provides any justification for why the debtor
25 -- either of the debtors should be liable for the claims

1 arising from the mortgages issued by WMB.

2 That -- that would be his testimony today, Your
3 Honor.

4 THE COURT: All right. Is there anybody here for
5 either the Lloyds or the Soucek family trust?

6 MR. LLOYD: Mike Lloyd, I'm here.

7 THE COURT: All right. Do you want to respond to
8 the debtors' testimony that there is no claim against the
9 debtor and, rather, your claim is against the bank?

10 MR. LLOYD: Well, I'm not agreeing with them as
11 those separate entities and I don't think the Court did
12 either. Already I think Your Honor has ruled that they
13 acted a single control or single person controlled that
14 entity where WMI, WMB were all one in the same. They
15 advertised that on the internet. They even acted in the
16 office of thrift which is responsible for mortgages seized
17 their company. The announcements that were made on the
18 internet certainly -- and the press certainly do not
19 differentiate between WMI, WMB or any other groups that they
20 may have -- have put together.

21 So it seems like a share game for their
22 convenience to me. But they're objecting and saying that
23 they had no responsibility toward those of us that -- while
24 they owned -- owned controlling interests in WMB and they
25 directed WMB and all their executive team controlled WMB,

1 that just doesn't seem like there's any -- anything other
2 than a share game. Let's play hide behind the corporate
3 vale.

4 And so that -- in that regard, in my opinion, the
5 WMI is Washington Mutual and they are related and all
6 connected. They've harbored the same logo. They've had the
7 same billing addresses. When we sent payments in, it was
8 sent -- payments were sent to WaMu. It wasn't sent to WMB.
9 It wasn't sent to anything other than WaMu. So that seems
10 to, I guess, make their -- their claim that WMI is separate
11 from WaMu disappear.

12 THE COURT: Debtor wish to reply?

13 MR. ROSEN: Your Honor, we -- we've dealt with
14 this very issue several times over. And contrary to what
15 Mr. Lloyd says, these are the wrong party claims that are
16 exactly the kind that the Court has disallowed pursuant to
17 the nineteenth, the twenty-first, the sixty-third, and
18 sixty-fifth omnibus objections where the Court found the
19 distinction between WMI and Washington Mutual Bank.

20 WMI observed all corporate formalities, Your
21 Honor, with WMB. They were separate entities. WMI did none
22 of these operations that Mr. Lloyd is referring to. They
23 were either done by Washington Mutual Bank or by Washington
24 Mutual Bank's subsidiary that did the origination of the
25 mortgages.

1 With respect to where payments are made, I don't
2 know, but I doubt that they went to the corporate offices of
3 Washington Mutual, Inc.

4 Your Honor, for this reason we would just reassert
5 the same objection that the Court has already upheld several
6 times over, to point out the wrong party nature of this and
7 the separateness of Washington Mutual, Inc. and Washington
8 Mutual Bank. We apologize that there were these issues,
9 but, unfortunately, they are separate entities and there is
10 no claim against the debtors themselves.

11 THE COURT: Well, I agree --

12 MR. LLOYD: Can I --

13 THE COURT: Go ahead, Mr. Lloyd.

14 MR. LLOYD: I -- I was just going to say that's
15 nice if we could just waive the magic wand and tell
16 everybody that let's make a claim disappear. But there's --
17 there's way too many egregious things that are going on here
18 that -- that they're objecting to my claim hiding under the
19 Washington Mutual Bank or Washington Mutual -- WMI and --
20 and saying that WMI is not WMB. Well, the guy who was the
21 president of WMI wanted to be the Wal-Mart of banks. The
22 only parts that they forgot is the whole customer service
23 thing, and when these guys have -- have the banking is their
24 business and they are -- can't seem to get a deposit put in
25 the right account and they cause damage to somebody because

1 of breach of performance, then this -- this claim cannot be
2 dismissed according -- you know, I'm not a lawyer, but I'm
3 simply reading that, you know, that when there is
4 impropriety that goes on, you just can't get rid of a claim,
5 misconduct alleged. You just can't throw a claim out.

6 So WMI, WMB are one in the same from the public's
7 eyes, from the operational eyes, and -- of this -- this
8 whole process. And it's nice that they're saving that and I
9 appreciate that they've got someone there that used to work
10 for Washington Mutual that's now being paid for somebody
11 else making testimony. But, quite frankly, I think he's
12 conflicted and not capable of making a decision for everyone
13 else.

14 This -- they're paying lawyers' fees that -- that
15 are far in excess of what -- what this claim is, not that
16 the amounts matter, but to me it seems that we're letting
17 Washington Mutual who declares bankruptcy escape without
18 having to pay any fines or fees. And obviously there's --
19 there's no question that -- that they couldn't put a simple
20 deposit into the right account. There's no question of
21 breach of performance. They admit it in a letter which has
22 been submitted to you guys. There's no question that they
23 attempted to foreclose on a mortgage that they did not own
24 and -- and in doing so damaged my personal and professional
25 reputation, not to mention my -- my financial situation.

1 So, you know, all of that's fine and dandy that -- that
2 they want to separate out and hide behind the corporate veil
3 and play the shell game, but that's neither justice nor
4 fairness nor -- nor in agreement with what the Court's
5 already ruled.

6 THE COURT: Well --

7 MR. LLOYD: And Tranquility you -- Your Honor was
8 smart enough to separate out the way that it meant and you
9 were able to judge that these guys were one singly
10 controlled entity. So in my mind that -- that should apply
11 here and that order should stand and this claim should be
12 paid.

13 THE COURT: Well, the Tranquility decision didn't
14 find as a matter of law or of fact that the corporate veil
15 should be pierced. I simply held that they stated a claim;
16 that if they were able to prove those facts, they stated a
17 claim. However, I have not ruled at any point that anybody
18 has proven what you're suggesting, which is piercing the
19 corporate veil. And -- and the burden of proof is on the
20 creditor who is asserting that.

21 In this country, corporate entities are separate
22 legal entities, and in the absence of proving why they
23 should be ignored, the corporate entity must be
24 acknowledged. So the burden --

25 MR. LLOYD: I --

1 THE COURT: -- the burden of proof is on you to
2 prove it and I'm not hearing any proof. I think it's clear
3 that you --

4 MR. LLOYD: Okay.

5 THE COURT: -- dealt with the bank and the actions
6 of which you complain were those of the bank, not its
7 parent, Washington Mutual, Inc.

8 So I -- I do have to sustain the objection to your
9 claim.

10 MR. LLOYD: Well, Your Honor, I'm reading just
11 from Wikipedia from news reports from the Wall Street
12 Journal and each of those defines WaMu as one singular
13 entity. They don't separate out that the -- the different
14 entities that are Washington Mutual, et al. They -- they --
15 they indicate operating under the same WaMu logo, the same
16 executive addresses, the same leadership team, the same
17 executive committee. All of that is identical.

18 And -- and, of course, in the Tranquility order it
19 says, you know, prior to filing, WMI had directly or
20 indirectly owned all of the outstanding capital stock of
21 Washington Mutual Bank, WMB. WMB's subsidiaries, including
22 Washington Mutual Asset Corp and WaMu Capital Corp. You
23 know, from -- from a layperson's perspective, from somebody
24 who is being serviced by Washington Mutual, you know, it's
25 -- it's one in the same entity. And while legally that

1 might not be true, this -- this would -- this would allow
2 for illegalities and breach of performance to go on
3 untethered, unchecked --

4 THE COURT: Now -- now --

5 MR. LLOYD: -- and --

6 THE COURT: -- Mr. Lloyd, Mr. Lloyd, you have a
7 claim against the bank.

8 MR. LLOYD: Okay.

9 THE COURT: All right. But there's a difference
10 between saying you have a claim against the bank for
11 illegalities and a claim against Washington Mutual, Inc.
12 And I'm hearing no proof. You know, something stated in the
13 press that a one trade name is used to refer to more than
14 one entity is not proof that the entities were not two
15 separate legal corporations that operated as such.

16 MR. LLOYD: And I'm with you, Your Honor, on that.
17 I mean, I understand how -- how something about the
18 corporations and that's the way to proceed. However, my
19 mortgage, when I took out the application, was with First
20 Trust and the bundling that occurred to allow First Trust
21 Mortgage to sell my mortgage to Washington Mutual, all I got
22 in the mail was a notice that said, pay -- pay to WaMu,
23 We're now -- your payments are now going to Washington
24 Mutual. It didn't say Washington Mutual Bank. It didn't
25 say Washington Mutual, Inc. It just says, WaMu, that's --

1 you know, it's got their letterhead on it, their logo.

2 So --

3 THE COURT: All right.

4 MR. LLOYD: -- what happened was --

5 THE COURT: But your transaction was with a bank.
6 It was not with a corporate holding company.

7 MR. LLOYD: Well, if the corporate holding company
8 controlled the assets and everything else from the bank, it
9 would seem to me that -- that they are still one in the
10 same.

11 THE COURT: Well, it -- it's -- quite frankly,
12 your argument is not enough for me to find that the
13 corporate veil should be pierced. They were two separate
14 corporations and I think I have to deny your claim. Your
15 claim is against the bank, not against this corporate
16 entity.

17 MR. ROSEN: Your Honor, may I approach?

18 MR. LLOYD: When -- Your Honor, when we called to
19 complain with customer service and we escalated the customer
20 service issue, they sent me to what was the executive team
21 at Washington Mutual. It wasn't -- it wasn't Washington
22 Mutual Bank. It was the executive team with Mr. Carney in
23 charge. And now the young lady's name, Ms. Felicia
24 Washington, who communicated with me, she was at the
25 corporate offices in -- out in -- on the west coast.

1 And so, you know, they then operated at that point
2 as one single control entity.

3 THE COURT: Well, I -- what -- your argument is
4 not sufficient proof that they did not act as separate
5 entities. And I am going to overrule -- excuse me --
6 sustain the objection to your claim.

7 MR. LLOYD: I -- I like overrule better.

8 (Laughter)

9 THE COURT: I know, but I'm -- I'm overruling your
10 claim.

11 MR. ROSEN: Your Honor, may --

12 MR. LLOYD: Okay. Does that -- and then if you're
13 overruling my claim, does that allow me then to pursue the
14 bank?

15 THE COURT: You always have --

16 MR. LLOYD: Because, you know, we -- we were
17 deemed -- we were deemed valid claimants by being on KCC's
18 list and I guess the Court's have had in the past, if that's
19 the case, that we're valid claimants because we're on the
20 KCC list of creditors. So it would seem to me that -- that
21 if you don't separate -- if you -- if you overrule based on
22 -- or sustain the objection based on the separate entities,
23 then we can't hardly be left out because of being left on
24 the creditor list. And as a member of the creditor list,
25 then they're deemed to be valid creditors. I'm just reading

1 what -- what they say in the different cases that have
2 occurred. Not being a lawyer, of course, that probably puts
3 me at a handicap, but --

4 THE COURT: All right. Mr. Rosen -- Mr. Rosen.

5 MR. ROSEN: Yeah. Sir, the KCC list was merely
6 just a registry which sets forth everybody that filed a
7 claim against the estate and what the status is.

8 To the extent that you have a claim against the
9 estate, your obligation is to file it with the FDIC as
10 receiver for the bank itself.

11 THE COURT: To the extent you have a claim against
12 the bank.

13 MR. ROSEN: The bank. Yes.

14 THE COURT: Not the estate.

15 MR. ROSEN: I'm sorry. The receivership.

16 THE COURT: Yeah.

17 MR. ROSEN: You can still file it against the --
18 with the FDIC as receiver.

19 THE COURT: Yeah. Any claim --

20 MR. LLOYD: Okay.

21 THE COURT: -- filed in this case is being
22 disallowed because it's only a claim against WMI or the
23 other debtors.

24 MR. ROSEN: May I approach, Your Honor?

25 THE COURT: Yes.

1 All right. I'll disallow the claims, then, and
2 sustain the objection.

3 MR. LLOYD: Your Honor, I -- I object to the
4 objection and the sustaining of the objection, and -- and I
5 think that it's probably a miscarriage of justice for me to
6 be not allowed this claim simply because there's -- there's
7 way too many avenues to approach this that would suggest
8 that these guys are escaping with breach of performance that
9 rises to payment and that have damaged us, and now they get
10 to walk away from it.

11 THE COURT: All right. I've -- I've sustained the
12 objection to your claim and I am disallowing your claim.

13 MR. LLOYD: Okay. And does -- does that mean that
14 I cannot pursue the bank?

15 THE COURT: To the extent you have a claim against
16 the bank, I am making no ruling on any claim you may have
17 against the bank.

18 MR. LLOYD: Okay. And so does that also mean that
19 -- that you're -- that we're not hindered by this -- this
20 objection or this disallowance and that we can pursue FDIC
21 and that sort of thing?

22 MR. ROSEN: In the receivership.

23 THE COURT: I'm -- I'm not making any ruling as to
24 any claim you have against the FDIC as receiver of the bank.

25 MR. LLOYD: Okay.

1 THE COURT: All right.

2 MR. ROSEN: Thank you, Your Honor.

3 That -- that takes us to Item Number 23, which is
4 the seventy-fourth omnibus objection. In this one, Your
5 Honor, we objected to a number of claims on substantive
6 grounds. We objected to two claims of vendors that were
7 for services provided to the bank branches pursuant to
8 contracts between the claimants and Washington Mutual Bank.
9 JPMorgan Chase actually paid such claimants in full for
10 these claims.

11 Additionally, we objected to one municipal claim
12 for fines levied on a Washington Mutual Bank branch just as
13 we had previously filed objections to similar claims.

14 Additionally, Your Honor, we sought to reduce and
15 allow two claims of former employees. The claimants agreed
16 with us as to the amount of such claims, but were unable to
17 amend their claims prior to the start of the confirmation
18 hearing, and pursuant to the confirmation order filed on
19 February 16th, no claims can be filed, either newly asserted
20 claims or claims amending the previously filed ones.

21 Finally, there were four claims arising from
22 Washington Mutual Bank subordinated notes. These claims
23 were filed long after the debtors had filed the fifty-fifty
24 omnibus objection in November 2010, so these claims were not
25 included in that objection. And by this objection, we

1 simply seek the same treatment for those claims; that they
2 would be placed in Class 17(b) pursuant to the plan.

3 There was one response by the deadline of April
4 2nd, and that was filed by Marlene Carr on account of her
5 Washington Mutual Bank subordinated note claim. And in
6 that, Your Honor, Ms. Carr stated "I bought this bond with
7 the understanding that Washington Mutual Bank was a thriving
8 financial institution. I feel I am entitled to a financial
9 settlement for the bond now showing nearly valueless on my
10 investment statement. I have limited financial means and
11 having my ten-thousand-dollar bond investment drop in value
12 to zero greatly impacts my financial well-being."

13 Unfortunately, Your Honor, there was nothing in
14 this response that justifies why this claim should be in
15 anything other than in Class 17(b) with the other Washington
16 Mutual Bank subordinated note claims. So we would ask the
17 Court to deny Ms. Carr's objection and grant the seventy-
18 fourth omnibus objection as we filed it, Your Honor.

19 THE COURT: Is there anyone here for Ms. Carr?

20 (No verbal response)

21 THE COURT: All right. I will sustain the
22 objection.

23 MR. ROSEN: May I approach, Your Honor?

24 THE COURT: You may.

25 MR. ROSEN: Your Honor, next is Item 24 which is

1 the examiner's motion for an order discharging the examiner,
2 approving disposition of documents, and granting related
3 relief.

4 Mr. Sewell is here in the courtroom on behalf of
5 the examiner. Your Honor, Mr. Sewell and I did have
6 discussions prior -- last week with respect to this relief
7 being requested. Specifically, we pointed out that the
8 litigation subcommittee is now getting up to speed as the
9 subcommittee of the trust itself, and they may have some
10 questions or at least want to discuss some of these
11 documents or at least get their eyes on some of these
12 documents.

13 And we have worked out an understanding with Mr.
14 Sewell that there would be a thirty-day lag time;
15 specifically, Your Honor, that I think we were the only
16 party that did raise any points -- no, there were others?

17 MR. SEWELL: I think there's one objection.

18 MR. ROSEN: Oh, there's one objection. With
19 respect to our point, Your Honor, we had said that as long
20 as there was a thirty-day period for the litigation
21 subcommittee to raise an issue, that that would come back to
22 the Court. The examiner agreed to that.

23 I'll now hand it over to Mr. Sewell to address the
24 other objection.

25 THE COURT: All right.

1 MR. SEWELL: Good morning, Your Honor. Henry
2 Sewell, McKenna Long Aldridge representing the examiner. I
3 have Kate Stickles from Cole Schotz with me today as well.

4 Your Honor, we have filed with the Court a motion
5 to formally discharge the examiner from his service in this
6 case. We have requested relief that I believe is consistent
7 with relief granted to examiners. In fact, I think the
8 order that we requested is pretty typical both in this
9 district as well as the Southern District of New York in
10 terms of the relief granted to an examiner at the close of
11 an examination.

12 Your Honor will recall, we were appointed in the
13 summer of 2010. We were asked to complete a report in a
14 very short time frame. We took one very short extension.
15 We completed our report and filed a three-hundred-and-sixty-
16 page report with exhibits with this Court on November the
17 1st. That report is posted still on our website as publicly
18 available. The exhibits are publicly available and we'll
19 leave the report up probably for some period of time to come
20 if anyone wants to -- to look at it.

21 We opted to wait to seek a formal discharge given
22 the significance of the issues raised in our report, the
23 fact the case was still ongoing. We did not seek a formal
24 discharge. We did not believe it would be appropriate to do
25 so until the case was resolved. Now that the case is

1 essentially resolved we have filed our motion for discharge
2 and we're essentially, Your Honor, seeking three forms of
3 relief.

4 We are requesting, obviously, that the examiner be
5 formally discharged.

6 We are requesting that we be permitted and
7 authorized to dispose of, destroy, or return documents that
8 we obtained during the course of our examination subject to
9 the carve out from Mr. Rosen and I have taken our order and
10 made some changes to it that I believe Mr. Rosen is -- is
11 happy with.

12 We seek relief from this Court to prevent third
13 parties from seeking discovery from the examiner without
14 first coming to Your Honor to determine whether discovery is
15 truly necessary. In prior cases, Your Honor, Mr. -- Mr.
16 Hothberg (ph) has been the examiner in two other cases and
17 in each of those cases the examiner sometimes is viewed as a
18 free source of discovery. So we request as part of the
19 discharge that we be relieved from any obligation to respond
20 to discovery. If there is something that someone truly
21 needs from the examiner, they can come to this Court and ask
22 for this Court to determine whether or not discovery should
23 be had from the examiner.

24 We request an exculpation of the examiner and his
25 professionals; that is, a release from any claims that might

1 be made against the examiner in connection with the report
2 that was filed and the conclusions that were reached in the
3 report. We believe, also, that that's necessary and
4 appropriate in the circumstances of -- of this case in
5 particular.

6 And, finally, Your Honor, we have filed a final
7 application for compensation. And I apologize to Your
8 Honor. I think I might have gotten a little bit ahead of
9 everybody in this case. I did -- we were following the case
10 somewhat, but not in detail, and so at the time I filed that
11 I did not understand there was going to be a final fee
12 process that all the parties were going to participate in.
13 I'm happy if Your Honor wants to defer ruling on that until
14 Your Honor hears the other final applications. That -- that
15 is certainly more than acceptable to us.

16 But just by way of reports, Your Honor, in our
17 final fee application we are requesting, essentially, final
18 approval of fees and expenses of \$6.2 million, approximately
19 5.9 million of that represented the fees necessary to
20 complete the report. That sum includes \$23,907 which has
21 not yet been paid, but we seek allowance of on an interim
22 basis and payment on an interim basis, and as -- as well as
23 the 23,000 includes a ten-thousand-dollar allowance for the
24 clean-up work necessary to have this motion approved and to
25 deal with any -- any objections or issues which come up.

1 Other than Mr. Rosen's issue which -- which I
2 think we've resolved, there was a formal written objection
3 filed by an individual named Mr. James Berg. Mr. Berg filed
4 a written pleading with this Court objecting to the
5 discharge of the examiner. I believe the objection -- the
6 substance of the objection is that Mr. Berg disagrees with
7 the conclusions and recommendations we made in our report.
8 We obviously stand by those conclusions. We believe they
9 were thoroughly researched, well-founded and -- and I
10 believe they've been largely sustained by this Court during
11 the course of this case.

12 However, despite that, the fact that he might
13 disagree with our conclusions is not a basis to deny the
14 examiner discharge as we requested in this case. So we
15 would request that that objection be overruled and -- and
16 our order, as we've agreed to the modification with Mr.
17 Rosen, be modified -- be granted as well.

18 THE COURT: All right. Mr. Berg. Is Mr. Berg on
19 the line?

20 (No verbal response)

21 THE COURT: All right. Well, I'm prepared to
22 overrule Mr. Berg's objection. I think not only is it
23 simply that he disagrees with the report, but I think it is
24 rehashing arguments made by Mr. Berg at the confirmation
25 hearing.

1 And I agree it is not a basis --

2 MR. BERG: Hello.

3 THE COURT: Yes. Mr. Berg?

4 MR. BERG: Oh, there we are. I'm sorry. I do not
5 object to the examiner's discharge. I don't know why I was
6 offline there for a bit. My main -- my main issues are
7 regarding the exculpation and the destruction of documents
8 is the -- is the large one for me. That -- at this point we
9 -- I mean, I've got a list of documents I expected to
10 feature prominently in the examiner's report and they did
11 not. That -- that is in large part why I disagree with the
12 -- I mean, he is -- he has painted it basically as me
13 disagreeing with the conclusions.

14 What I -- what my argument is more along the lines
15 of not so much disagreeing with the conclusions as there are
16 documents that -- that I know of that are in -- for example,
17 the PF -- PSI report that I believe should have been
18 considered by the examiner, should have been included in his
19 report and that paint an entirely different picture than
20 what he -- what he addressed in his report.

21 THE COURT: Well, then isn't that simply
22 disagreeing with the report and the conclusions of the
23 report?

24 MR. BERG: I -- I can -- I guess to an extent that
25 might be true. I -- let me -- let me revise my train of

1 thought. I've -- you just completely derailed it. All
2 right. Assuming we do that, my argument basically was to
3 hold off on the destruction of documents. We've got --
4 let's see here, skip way ahead.

5 Basically, if the documents are destroyed, we have
6 no way of knowing whether the examiner holds other documents
7 which might indicate misconduct on the part of the examiner.
8 That -- that is my primary concern right there. If they're
9 destroyed, obviously, the way -- if he operates in his own
10 self-interest he's going to destroy anything that might
11 essentially be damaging to him and retain anything that --
12 that could be -- could support his cause if there is any
13 later litigation regarding potential misconduct. And if he
14 -- if he destroys these documents we have no way of knowing
15 whether -- whether any of the other documents he holds
16 justify misconduct.

17 MR. SEWELL: Your Honor, may I address the issue
18 of the documents for a second? I -- I think I can alleviate
19 whatever concern might be there.

20 The vast majority of documents that we obtained
21 during the course of our investigation were -- were either
22 from the database maintained by Weil Gotshal or were
23 subsequently deposited into that database as we conducted
24 our investigation. So, essentially, the -- you know, ninety
25 percent of what we have is duplicative of what the debtor

1 already has.

2 We did obtain some documents, pretty limited
3 documents from third parties. We entered into
4 confidentiality agreements with those third parties which
5 obligated us to either destroy those or return those to
6 those third parties. So, in essence, we would be complying
7 with our obligations to those third parties.

8 We filed -- Your Honor, many of our documents that
9 we relied upon were attached to the report and are still
10 available. You can look at the exhibits that are attached
11 to the report online and pull down PDFs of those. So the
12 reality is that the documents that we are getting rid of,
13 basically, are primarily either extra copies of what the
14 debtor already has or they're documents that we have
15 obligations with respect to the third parties to -- to
16 destroy or return them.

17 THE COURT: Yeah. And, Mr. Berg, I -- I see
18 nothing unusual about the examiner's request. The examiner,
19 other than his report, has no documents that aren't
20 available from other parties and I agree that the examiner
21 is not supposed to act as a free repository for discoverable
22 evidence.

23 To the extent you --

24 MR. BERG: But the --

25 THE COURT: To the extent you're suggesting that

1 the -- you want the documents because you may want to
2 instigate litigation against the examiner for misconduct,
3 I'm not going to allow that. The examiner was appointed as
4 an officer of the court to provide a report to the Court and
5 the examiner did exactly what the Court asked the examiner
6 to do. Whether you disagree with the conclusions of the
7 report, I don't think that's relevant. I think the fact is
8 the report was issued and that's exactly what the examiner
9 was required to do. And the examiner is entitled to
10 exculpation to the extent his activities were conducted in
11 this case.

12 MR. BERG: Okay. Well, thank you, Your Honor, for
13 considering my -- my attempt at least.

14 THE COURT: All right. I will enter the order.
15 You've worked out the thirty-day --

16 MR. SEWELL: Yes, Your Honor. We'll submit that
17 order under certification of counsel.

18 How does your -- does Your Honor want me to wait
19 with respect to the final application for compensation so
20 that's heard with the other ones or -- or should we submit
21 an order on that as well?

22 THE COURT: I -- I don't think there's any reason
23 to wait. Do any of the other administrative professional
24 parties agree?

25 MR. ROSEN: We have no problem with it going

1 forward now, Your Honor.

2 THE COURT: All right.

3 MR. SEWELL: Okay.

4 THE COURT: I have no problem with the fee
5 requested by the examiner. I will approve it --

6 MR. SEWELL: Okay.

7 THE COURT: -- on a final basis.

8 MR. SEWELL: Thank you, Your Honor. I appreciate
9 that.

10 And with that, Your Honor, may I be excused?

11 THE COURT: You may.

12 MR. SEWELL: Thank you.

13 MR. ROSEN: Thanks.

14 THE COURT: And I thank the examiner for his work.

15 MR. SEWELL: Thank you.

16 MR. ROSEN: Thanks, Henry.

17 Your Honor, that takes us to Item Number 25, and
18 it's reflected on here as being continued. I just want the
19 Court to note that this was the motion of Greg Camas or
20 Camas with respect to extending the time period to file a
21 claim.

22 THE COURT: Okay.

23 MR. ROSEN: So we're going to push that to the end
24 of May.

25 THE COURT: Okay.

1 MR. ROSEN: Your Honor, what I would like to do
2 now is proceed to Item Number 28, which were all of those
3 fee applications that we had attached there or the index as
4 Exhibit H referenced. I know that speaking from -- I know
5 that speaking from the perspective of Weil, Gotshal and
6 Manges, we have had some discussions with the United States
7 Trustee, Ms. Leamy, and as a result of that, Weil, Gotshal
8 reduced its fee application by \$50,245.78. This was a
9 voluntary reduction, but it addressed some of the concerns
10 that Ms. Leamy had.

11 I know that we have circulated to the parties a
12 chart which sets forth what the numbers are after
13 discussions with Ms. Leamy for the other professionals as
14 well, and I believe that the United States Trustee has no
15 objections to the entry of this form of order on an interim
16 basis subject to the final fee hearing which is going to be
17 heard, Your Honor, in the last week of July.

18 THE COURT: Is that correct, Ms. Leamy?

19 MS. LEAMY: Good morning, Your Honor. Jane Leamy
20 for the United States Trustee.

21 Mr. Rosen's correct and I believe there is a
22 summary chart that he will hand up that indicates some other
23 reductions as well.

24 Thank you.

25 THE COURT: Okay.

1 MR. ROSEN: Your Honor, may I approach?

2 THE COURT: You may.

3 All right. Well, there were some objections, I
4 think, to some of the interim fee requests.

5 MR. ROSEN: Yes, Your Honor. I don't know if Mr.
6 Schukfed (ph) is on the phone. Mr. Schukfed files one to
7 the Weil Gotshal and to the Alvarez and Marsal every month
8 as well as I think he -- he may now lodge some to --
9 objections to a few others as well. And he has been doing
10 this throughout the Chapter 11 case, Your Honor. We've
11 never addressed them, Your Honor. We've always said we
12 would carry it to the final. If the Court would like to
13 address it now, obviously -- Mr. Schukfed may be on the
14 phone. I don't know, though.

15 THE COURT: I thought I saw -- I guess he is not.
16 I will deal with those at the -- at the final fee
17 application. I had no other concerns and will approve the
18 fees on an interim basis.

19 MR. ROSEN: Thank you very much, Your Honor.

20 Your Honor, I think we can get rid of one other
21 status conference on a fairly expedited basis, and this
22 would be Item Number 27 on the agenda. It is a status
23 conference with respect to the adversary proceeding that was
24 commenced, Washington Mutual, Inc. versus XL Specialty
25 Insurance Company, et al.

1 (Pause)

2 MR. OLIVERE: Good morning, Your Honor. Mark
3 Olivere, Cousins, Chipman and Brown, counsel to WMI
4 liquidating trust with respect to adversary proceeding 12-
5 50422 against XL Specialty Insurance Company and eleven
6 other insurance carriers.

7 Your Honor, today was originally scheduled as a
8 Rule 16(b) scheduling conference, but with the consent of
9 chambers and the stipulation among the parties here, we have
10 agreed to go forward today as just a status conference only.

11 Your Honor, in connection with that the parties
12 filed a join status report last Friday. A copy should have
13 been included in your binder. If you don't, I have another
14 copy I can hand up.

15 THE COURT: I do have that.

16 MR. OLIVERE: Okay, Your Honor.

17 Well, Your Honor, joining me is my co-counsel,
18 Matt Heyn from the law firm of Klee, Tuchin, Bogdanoff and
19 Stern. Mr. Heyn has previously been admitted pro hac in
20 these cases and with the Court's permission I'll just turn
21 it over to Mr. Heyn to go over the status and answer any
22 questions you have.

23 THE COURT: Thank you.

24 MR. HEYN: Good morning, Your Honor. As my
25 colleague said, Matt Heyn, from Klee, Tuchin, Bogdanoff and

1 Stern.

2 Your Honor, this is a adversary proceeding against
3 twelve insurance carriers seeking damages for breach of
4 contract, damages for breach of the duty of good faith, and
5 declaratory relief.

6 Pursuant to Your Honor's order, we've continued
7 the response deadline to the complaint until today. At our
8 Rule 26(f) conference with the insurance carriers they
9 indicated that they would be filing a motion -- one or more
10 motions to dismiss today, which we will answer in five
11 weeks, and a reply will be coming shortly thereafter.

12 We would propose that the Rule 16 scheduling
13 conference be continued until about one month after Your
14 Honor decides these motions to dismiss. Although they might
15 not have made it in the binder, there was filed a joint
16 status report signed off by all parties to this adversary
17 proceeding agreeing to this -- this course.

18 THE COURT: Yeah. I did see that and that is
19 fine.

20 MR. HEYN: If Your Honor has any questions, I'm
21 happy to address them now. I -- I don't want to unfairly
22 prejudice the defendants who may not be here.

23 THE COURT: No. I have no questions.

24 MR. HEYN: Thank you, Your Honor.

25 THE COURT: All right. Thank you.

1 MR. ROSEN: Your Honor, I believe that takes us
2 now to Items 20 and --

3 THE COURT: 26.

4 MR. ROSEN: -- 26, that sounds about right, 26 and
5 I will cede the podium to Mr. Etkin or Mr. Sherwood and Ms.
6 Kaswan.

7 THE COURT: Thank you.

8 (Pause)

9 MR. SHERWOOD: Good morning, Your Honor.

10 THE COURT: Could -- could the operator mute the
11 lines? We're getting some screeching. Thank you.

12 Go ahead.

13 MR. SHERWOOD: Your Honor, Jack Sherwood from
14 Lowenstein Sandler. My partner, Mickey Etkin is here. Beth
15 Kaswan, Chris Lometti and Craig Springer for the MBS
16 plaintiffs.

17 This is our motion to allow the MBS claim as a
18 Class 12 claim. This motion was initially filed before
19 confirmation and was postponed until after confirmation by
20 the Court and then adjourned a few times by the -- by the
21 parties until today. Also, by stipulation with the debtors,
22 we were allowed to file a reply by Friday at noon, which we
23 filed.

24 THE COURT: I did get that.

25 MR. SHERWOOD: Your Honor, I think that reply and

1 our original papers pretty well lay out our position on this
2 motion. But I would like to emphasize a few points.

3 First, Your Honor, when we talk about the
4 stipulation of November 20th, 2010, which is a focal point
5 of this motion, that stipulation permits the MBS plaintiffs
6 to re-file their claims in the event there is a recovery for
7 holders of allowed subordinated claims as that term is
8 defined in the plan.

9 Importantly, Your Honor, that stipulation does not
10 limit the form of the recovery under the plan and nowhere in
11 that stipulation is there an agreement by the MBS plaintiffs
12 with respect to classification of the claims once they are
13 re-filed.

14 One of the interesting or important points is that
15 the amended thirty-second objection to claims which gave
16 rise to the stipulation didn't even raise the issue of
17 subordination under Section 510(b), and neither did the
18 seventh amended plan address subordination. So I think when
19 you talk about the intent and the clear language of the
20 stipulation, it's clear on its face and the Court should
21 apply it as written.

22 The debtors argue that the term "recovery" has not
23 kicked in yet. I'll call this the trigger argument.

24 THE COURT: Uh-huh.

25 MR. SHERWOOD: Has -- has the trigger occurred for

1 the filing of the proof of claim, and we think it's clear
2 that it did. We cite to Black's Law Dictionary on recovery.
3 It's a -- it's a pretty easy word to figure out. The
4 trigger for re-filing the claim, Your Honor, was simply
5 recovery, not a non-contingent recovery. There is no
6 question, Your Honor, that there was a recovery to Class 18
7 under the seventh amended plan. We -- we make a number of
8 arguments on that point in our papers, but I think there --
9 there are two very good ones that I would like to highlight.

10 The first is if you look at Section 1126(g) of the
11 code, that provision provides that creditors who do not
12 receive any property under the plan are deemed to reject the
13 plan and they're not allowed to vote. Under the plan, the
14 debtors here considered Class 18 to be an impaired and
15 voting class, and if holders of Class 18 claims were not
16 entitled to any recovery under the plan as the debtors now
17 allege in the context of this motion, as a matter of law
18 under Section 1126(g) they would have been deemed to reject
19 the plan and not allowed to vote.

20 Now, consistent with that, Your Honor, the plan
21 itself provides at Section 30.2 at Page 73, it describes
22 impaired classes entitled to vote on the plan. And it says
23 the claims and equity interests in classes -- and it rattles
24 off a number of classes including Class 18 -- are impaired
25 and are receiving distributions pursuant to the plan and

1 are, therefore, entitled to vote to accept or reject the
2 plan.

3 Likewise, Your Honor, in this Court's solicitation
4 order which was filed on January 13th, 2011, it says at
5 Paragraph K on Page 4, that Class 18 is described as
6 subordinated claims and it says "they are impaired and
7 entitled to receive distributions under the plan."

8 So, Your Honor, the record is clear, by virtue of
9 1126, that the -- that Class 18 is receiving property under
10 the plan, and by virtue of this language in the plan and the
11 solicitation order that Class 18 is receiving a distribution
12 under the plan. I think it's clear that that also means
13 that they are getting a recovery under the plan and that
14 triggered -- that the trigger has been triggered and the
15 filing of the proof of claim was -- was warranted.

16 Next, Your Honor, let me turn quickly to the
17 argument by the objectors that somehow, somewhere in a
18 stipulation there is a presumed agreement to be in Class 18.
19 And my first response to that, Your Honor, is that when you
20 have a clear agreement you shouldn't presume anything. The
21 parole evidence rule, the case law on contract
22 interpretation makes it pretty clear that the Court should
23 not read something into a contract that isn't there. And,
24 here, there is nowhere in the stipulation where the MBS
25 plaintiffs agree to Class 18 treatment.

1 Again, when you highlight, Your Honor, that the
2 motion before the Court that gives right -- rise to the
3 stipulation was a motion not -- that didn't deal with
4 classification. It dealt with the merits of the claim. And
5 what happened back in November of 2010 was that you had a
6 situation where you had massive potential litigation to over
7 claim that may or may not have been subordinated at the
8 time, and simply the parties did what -- what parties do in
9 cases like that is -- is the MBS plaintiffs chose to
10 litigate that issue in the district court, fully reserving
11 all rights here once the trigger occur -- occurred. But
12 there was never ever an agreement to subordinate.

13 Your Honor, we -- we -- you know, we try to
14 highlight that because this is a big case with a lot of
15 things going on. And in this case the debtor sought and
16 obtained agreements from various parties and we -- we
17 referred to a couple of those agreements where subordination
18 was sought and obtained by the debtors. So, certainly, if
19 the debtors intent was to get us to subordinate back in
20 November of 2010, they knew how to do that, but they didn't.

21 Your Honor, the -- we also -- we also cite the
22 Court to the comments of debtors' counsel prior to
23 confirmation in the context of the estimate -- the voting
24 motion. We -- we cite to the quote where counsel says that
25 all the debtor had dealt with up to that point in time was

1 whether the claim would ultimately be allowed or disallowed
2 on the merits. And, Your Honor, I tried -- I've tried to
3 make it clear every time I've gotten up here was that we
4 never ever were seeking a full blown hearing on the merits
5 of our claim, but we just wanted to know what class we were
6 in before confirmation so that we could address that at
7 confirmation.

8 But -- but what counsel said quite clearly was
9 that the debtor never took the position at all as to whether
10 they -- that's the MBS plaintiffs -- would be treated in
11 Class 12 or Class 18. So when he stood here and said that
12 prior to confirmation, he conceded that the debtors and the
13 estate had not obtained a concession from us with regard to
14 subordination.

15 Yet, in the context of this motion, Your Honor,
16 the debtor suggests that they had obtained such a concession
17 and that it was clear that those positions, frankly, are --
18 are very, very inconsistent. The debtor is also -- and the
19 committee before the confirmation hearing suggested to this
20 Court when we were trying to have the issue of the class of
21 our claim heard and determined by the Court before
22 confirmation, that the issue of whether we were in Class 18
23 or Class 12 was one that would require extensive litigation.

24 Again, Your Honor, that is a hundred-and-eighty
25 degrees from the position that they now take that this

1 agreement in November of 2010 in the stipulation is somehow
2 a clear indication that we agreed to be in Class 18.

3 If that was their position, Your Honor, I
4 respectfully submit that they should have made that clear
5 before confirmation. But for reasons that I think I've gone
6 into before with Your Honor and -- in the papers, that's not
7 something that they wanted to do. They deliberately took
8 the position that we were in Class 12 for voting purposes so
9 that they could turn around after confirmation, like they're
10 -- exactly like they're doing now and -- flip-flop on the
11 issue, which is interesting and creative, perhaps, but it's
12 totally unfair and unjust to my clients.

13 Your Honor, just a couple more points on -- on --
14 you know, the fact that we didn't agree to be in Class 18.

15 First, the seventh amended plan requires entry of
16 a final order determining that a claim is subordinated in
17 accordance with the Bankruptcy Code and -- and that would be
18 in plan Section 1.153, and no such final order was ever
19 entered.

20 And then, finally, Your Honor, on that issue
21 Paragraph 3 of the stipulation itself states that the
22 parties reserve all rights in all other respects, other than
23 those specifically addressed in the stipulation. The
24 stipulation has a full integration clause, so, again, Your
25 Honor, the stipulation should be read as its written and the

1 Court should not read anything into that concerning Class
2 18.

3 I -- at this point, Your Honor, I would like to
4 turn to the Tranquility issue that -- that's addressed by
5 the debtors' papers and -- and ours.

6 First of all, Your Honor, Rule 59(e) is -- is
7 ignored largely by the debtors' papers. That is a high
8 standard and it has to be something more than we forgot to
9 argue it the first time. And the objection by the committee
10 and the debtor or -- or the trust does not even try to --
11 try to address the Rule 59(e) standard. There was no newly
12 discovered evidence. There was no newly discovered legal
13 principle or intervening legal principle. It really is a
14 case that the estate professionals basically said, wow. We
15 should have -- we should have argued this SEC reg, but they
16 didn't.

17 Now we -- we are -- we are raising the Rule 59(e)
18 argument because we have it, but, frankly, Your Honor, we
19 think Tranquility was right. And whether you did or didn't
20 consider the SEC regulation, we think Your Honor would --
21 would decide the same way. And that is because the SEC
22 regulation talk about who was a depositor and who was an
23 issuer for SEC purposes. And, essentially, what that does
24 is it sort of spreads liability beyond, you know, in this
25 case the trust to other people who have the responsibility

1 for reporting and so forth.

2 But that's not why Your Honor -- Your Honor's
3 decision in Tranquility and in Mobil Tool is based on the
4 principle, which isn't changed in the least by the SEC reg,
5 that here we had some -- some trusts that had pools of
6 mortgages and the investors were not investing in a debtor
7 or an affiliate of the debtor, which is what 510(b) says.
8 They were -- they were investing in these pools of mortgages
9 and they didn't enjoy the benefits of good performance by
10 debtor or an affiliate or the -- or the risks of -- of bad
11 performance by a debtor or affiliate.

12 There, the successor failure of their investment
13 rose or fell based on the performance of the mortgages. And
14 I think in the -- in the Tranquility opinion Your Honor gave
15 the example of -- of a sale of Apple stock or a broker
16 dealer selling dealer securities and suddenly bringing --
17 having that -- those types of situation bring 510 into play,
18 and that certainly is not the intention of 510 and it
19 shouldn't be applied, whether or not you consider that --
20 that SEC reg.

21 And, Your Honor, just to wrap that up, we also
22 cited from, I think it's Judge Shannon in SemCrude where he
23 made a -- a statement that is very applicable here, and that
24 is that, you know, a word might have one meaning for SEC
25 purposes where the SEC wants accountability and maybe to

1 spread responsibility for certain things, but another for
2 510 and -- and we think that Your Honor -- Your Honor's view
3 of Tranquility and the purpose of 510 should continue to
4 carry the day, if the Court has to get there because they
5 haven't satisfied Rule 59(e).

6 Your Honor, let me just spend one -- one more
7 brief period of time on -- on the reserve issue and the
8 release. Of course, Your Honor, it's our view that that
9 reserve needs to stay in place while we get to the bottom of
10 this. The four-hundred-and-thirty-five-million-dollar
11 reserve was put up by the debtor in a Class 12. It was
12 their decision to do that, and that reserve must stand
13 throughout the pendency of this litigation until it's
14 litigated to a final order.

15 And I think if Your Honor reads the confirmation
16 order together with the language of the plan, it is beyond
17 dispute that unless and until this Court enters -- or this
18 Court or some other Court enters a final order disposing of
19 this claim, that escrow -- that -- that reserve needs to
20 stay in place.

21 So, again, Your Honor, obviously we hope that
22 doesn't become relevant for today's purposes, but if it
23 does, we -- we think that the Court cannot order the release
24 of the reserve because that would be a violation of the
25 clear terms of the confirmation and the plan pursuant to

1 which the reserve was set up.

2 Your Honor, I -- if the Court has any questions, I
3 -- I can answer otherwise I would maybe reserve some time on
4 rebuttal.

5 THE COURT: You may.

6 MR. SHERWOOD: Okay. Thank you.

7 MR. STROCHAK: Good morning, Your Honor. Morning
8 by just a few minutes till. Adam Strochak, Weil, Gotshal
9 and Manges for the liquidating trust.

10 Let me start with a little background on our
11 perspective on the stipulation issue and -- and the reasons
12 why we agree to it in the first place and -- and why we
13 think its intent is -- is quite clear from the language of
14 the stipulation as well as the circumstances under which it
15 was entered.

16 We knew fairly early on in this case that -- that
17 timely distributions were going to be critical and that in
18 order to achieve timely distributions, in order to -- in
19 addition to getting past confirmation, which took longer
20 than anyone hoped or anticipated, that we were going to need
21 to make progress in the claims process because we -- we were
22 fundamentally going to have a limited fund and there were
23 going to have to be certain reserves and those reserves
24 would -- would cause delays in distributions to -- to credit
25 -- to holders of allowed claims.

1 So we needed a priority throughout the case to
2 move as quickly as we could through the claims process and -
3 - and, obviously, as Your Honor is aware, we -- this is not
4 a case where we sat back and waited until the plan got
5 confirmed to -- to really make significant progress in
6 objecting to -- to claims and -- and moving through the
7 claims resolution process. So -- so that was really a quite
8 critical issue early on.

9 When we filed the initial objection and then
10 resolved the initial objection to the MBS plaintiffs'
11 claims, we had a plan out there that provided for a
12 contingent distribution to subordinated creditors with a
13 very wide range on it of somewhere between zero and a
14 hundred percent recovery.

15 So what we agreed to with them was a stipulation
16 that provided for the withdrawal of their claim. We didn't
17 simply stay the claims litigation process. We didn't just
18 agree to a standstill. We -- we worked out a stipulation
19 that provided for the complete withdrawal of their claims
20 with a right to re-file in the event there was a recovery
21 for -- for subordinated claims.

22 And we think it's quite clear when you look at the
23 stipulation as a whole and when you look at all the
24 circumstances under which it was entered, that implicit in
25 that and that the only reasonable way to interpret the right

1 to re-file language is that the right to re-file would --
2 would only apply to a subordinated claim. Otherwise, the
3 language regarding the timing of re-filing; that is, if
4 there is a recovery for subordinated claims, really makes no
5 sense at all.

6 If the -- if the plaintiffs were taking the
7 position that -- that -- that they were entitled to a
8 general unsecured claim, then it would have made sense to
9 proceed with that litigation and get to the point where
10 there was a judgment resolving their claim one way or the
11 other rather than deferring it until it became clearer what
12 the ultimate recovery for -- for subordinated creditors
13 would be.

14 The withdrawal has -- has meaning and -- and to
15 interpret the stipulation the way the plaintiffs are
16 suggesting now really -- really guts the meaning of the
17 stipulation from our perspective and what it achieved from
18 our perspective.

19 So fast-forward to -- to the current -- the plan
20 that was actually confirmed and we have a plan that -- that
21 provides for subordinated creditors much the same way as the
22 plan that was on file at the time of the stipulation. The
23 plan confirmed by the Court provides for a distribution of
24 -- of liquidating trust interests to subordinated creditors
25 if -- it's a contingent distribution -- if we ever get to

1 the point where there's sufficient value to clear what's
2 ahead of them in the waterfall. So it's a wholly contingent
3 right to receive liquidation trust interest at a time in the
4 future in the event that the waterfall satisfies all -- all
5 claims ahead of them.

6 So -- so when you compare what was on file at the
7 time of the stipulation and -- and what we actually ended up
8 with in a confirmed plan, there really is no difference from
9 -- from the perspective of the stipulation and what the
10 stipulation achieved for the debtors.

11 So the interpretation that the -- that the
12 plaintiffs are now offering is one that basically says,
13 well, there really was no bargain for -- for the -- for the
14 debtors; that is, we -- we had the right to re-file at any
15 time.

16 So while the debtors gave up their right and the
17 creditors' committee and every other party interest -- party
18 in interest in the case, while they -- they gave up their
19 right to proceed in a timely fashion with adjudication of
20 this claim so that it could be resolved and not present any
21 -- any difficulties for distributions to creditors on
22 account of any reserve or -- or any other issue -- that's
23 what the debtors got -- that the -- that the plaintiffs,
24 essentially, had the right to vitiate that bargain at any
25 time. They could come in at any time and say, well, you

1 know, the plan provides for a contingent right of
2 distribution to subordinated creditors. Therefore, there's
3 been a recovery and we can go ahead and -- and move forward
4 with -- with assertion of our claim.

5 And --

6 THE COURT: Mr. Strochak --

7 MR. STROCHAK: Uh-huh.

8 THE COURT: -- does the plan provide that
9 liquidating trust certificates are not distributed now, but
10 only after the waterfall is satisfied?

11 MR. STROCHAK: That's my understanding, Your
12 Honor. Yeah. I'm getting a lot of head nods that I got
13 that one correct.

14 THE COURT: Yeah.

15 MR. STROCHAK: So there's no actual distribution
16 of certificates at this time and while the liquidating
17 trustee, the trust advisory board, and -- and everyone else
18 who is involved in the process is obviously working as hard
19 as they can to get distributions as far down the waterfall
20 as -- as is possible, at this point we don't know whether
21 there ultimately will be any trust certificates distributed.

22 So we -- we made this point in our papers, Your
23 Honor, on the -- on the definition of recovery and in the
24 stipulation, of course. As interpreting that stipulation
25 one question for the Court is, well, what does it mean for

1 there to be a recovery, and I think, you know, Your Honor's
2 question suggests exactly where -- where we think it is, is
3 that nothing has been distributed at this point in time, so,
4 therefore, there's no recovery.

5 The plaintiffs' have cited Black's Law Dictionary
6 and they actually cite the second definition in Black's.
7 The first definition that Black's offers for recovery is --
8 is regaining or restoring something taken away. Well, under
9 our plan and -- and, you know, obviously, everybody wishes
10 it could have been better. But -- but nothing has been
11 regained or restored at this point. The subordinated
12 creditors, to the extent they had claims, be they disputed
13 or -- or fixed, to the extent that they had claims, they
14 have received nothing on those claims until some as yet
15 undefined point in the future hopefully; a bit of a hope
16 certificate on -- on those.

17 And they cited the Enron decision, which while not
18 directly on point and I don't suggest that it was directly
19 on point, provides a useful analogy. In Enron there was an
20 objection to -- to distributions -- excuse me. There was an
21 objection to the plan on the grounds that it was providing
22 property to -- to a subordinated class or to a shareholder
23 class, when what the plan said was that it would be a
24 contingent right of distribution should -- should
25 distributions clear the rest of the waterfall.

1 And -- and Judge Gonzalez, I believe, overruled
2 that objection and said, no. This doesn't violate the
3 absolute priority rule. There's no distribution being made.
4 It's simply a contingent right to get something in the
5 future should -- should the waterfall fill the rest of the
6 -- of the recoveries. And it's an analogous situation here.

7 So you may be asking, Your Honor, what -- what's
8 the harm in being early. We often complain that people are
9 late and the Bankruptcy Code has a -- Bankruptcy Code and
10 the case law, of course, has well defined standards for
11 under what circumstances we'll allow somebody to assert a
12 right if they -- if they're late. But what's the harm in
13 being early?

14 Well, here the harm is that it would vitiate the
15 bargain that we struck on -- on the stipulation; that we
16 bargained for the withdrawal of that claim so that we would
17 not have to deal with reserves, that we would not have to
18 deal with litigation of these issues unless and until there
19 was actually recovery for subordinated creditors. And it
20 has a very real effect on the other creditors of the estate,
21 on senior creditors of the estate.

22 There was -- I think -- I think Mr. Sherwood may
23 have misspoken unintentionally. The reserve is not \$435
24 million, you know, cash set aside. That's not the way the
25 reserve works under our plan. The way the reserve works is

1 -- is that we have to reserve for the claim as if it were an
2 allowed claim in the amount of 435. So all -- all claims,
3 all disputed claims are reserved for as if they were allowed
4 in that amount and then that is calculated in accordance
5 with the holdbacks and everything else.

6 The effect of reserving as if they are an allowed
7 claim is -- is quite significant due to the accrual -- the
8 accruing of post-petition interest, continuing accrual of
9 post-petition interest on claims -- on allowed claims that
10 have not received their distribution, and has a particularly
11 dramatic effect due to the Court's rulings with respect to
12 the pay-over requirements of the contractually subordinated
13 creditors, in particular the peers.

14 So we have those in our papers and -- and, you
15 know, the rough calculation is that -- that continuing to
16 reserve for the MBS plaintiffs' claim as if it were an
17 allowed claim of 435 million essentially incurs \$700,000 per
18 month in additional post-petition interest expense because
19 -- because that money, what's held back, can't be
20 distributed to holders of allowed claims and the interest
21 continues to accrue on what has not been distributed on
22 their claims.

23 The effect is much more significant on the peers
24 due to the contractual pay-over requirement. The peers,
25 while they accrue interest at the federal judgment rate in

1 accordance with the Court's order, they pay-over interest to
2 senior creditors at the contractual rate. So the effect on
3 the peers is to reduce their recovery by -- by about \$2
4 million a month. So it's a quite significant effect on --
5 on all creditors of the estate and a very dramatic effect on
6 the peers to continue to have to hold the reserve for -- for
7 the MBS claim.

8 Let me comment briefly on the assertion that we
9 somehow, I guess, sandbagged them and -- and that the
10 comments made in connection with the temporary allowance
11 motion at the time of confirmation are some type of
12 admission that -- that we never expected that -- that the
13 stipulation would limit them only to a subordinated claim.

14 It's always been our position that the -- that the
15 stipulation limited them to a subordinated claim. We just
16 didn't expect them to agree with it, and, obviously, they
17 haven't. The temporary allowance motion, Your Honor
18 remembers, was -- came before the Court on the MBS
19 plaintiffs' application to -- to temporarily allow their
20 claim into a Class 12 for voting purposes. They asked for
21 it in Class 12 and we looked at the circumstances and said,
22 okay. We can agree to that.

23 And -- and then they took a step back and said,
24 well, we're not sure we really want what we asked for.
25 We're afraid that you might ultimately try and subordinate

1 us, so what we really want is by -- by giving us temporary
2 allowance in Class 12, there ought to be a final
3 determination that -- that for distribution purposes we're
4 in Class 12. And we stood up and said, no. That's not what
5 temporary allowance is about.

6 And Your Honor ultimately agreed with us that --
7 that there was not going to be a determination of -- of the
8 classification for distribution purposes at the time of
9 confirmation; that that was an issue for later, and that
10 because the plaintiffs had asked for temporary allowance in
11 Class 12, it was appropriate to give them temporary
12 allowance for voting purposes in Class 12, notwithstanding
13 the fact that down the road there was going to be a dispute
14 over whether it was a general unsecured claim or a
15 subordinated claim, both under the stipulation and should we
16 clear the stipulation under -- under 510(b) which would --
17 which would need to be adjudicated.

18 And while the MBS plaintiffs contend -- contended
19 that that was unfair, Your Honor ultimately ruled that it
20 was not unfair; that creditors all the time bear the risk
21 that they might later be subordinated due to -- due to the
22 application of 510(b) or other principles of subordination.
23 So that's where we were on that.

24 Let me pause on the 1126 argument that -- that Mr.
25 Sherwood made in his remarks. He is suggesting that -- that

1 under 1126 creditors who didn't get property would be deemed
2 to reject and, therefore, if we go back to the question of
3 recovery, has there been any recovery at this point for
4 subordinated creditors that would allow reassertion of the
5 claim, that we should look to 1126(g) for guidance.

6 We certainly could have, under 1126(g) said that
7 there's no distribution to subordinated creditors. It's
8 only a contingent right in the event we clear the waterfall
9 later. So we'll just deem them to reject the plan and --
10 and effectively cram down over them. But that wouldn't work
11 under our plan, Your Honor.

12 Your Honor, we worked for -- for three years to
13 try and get a recovery to -- to shareholders. We had
14 enormous litigation over that and we ended up with a -- with
15 a plan that was the product of really an extraordinarily --
16 extraordinary compromise and we wanted anyone senior to
17 shareholders to vote in order to -- to confirm that plan
18 without having to deal with Armstrong issues or absolute
19 priority issues or anything else.

20 And, ultimately, we did get to vote. The plan was
21 confirmed in history. That's obviously very familiar to the
22 Court. So that's the reason why we proceeded that way. I
23 think we probably could have gone either way under 1126 and
24 that's why we opted to go the way we did.

25 Let -- let me turn if I could to merits of the

1 subordination argument and -- and start with the
2 reconsideration aspects. We're here on a different claim
3 now, Your Honor.

4 Tranquility had not filed a lawsuit before
5 asserting its proof of claim. The plaintiffs here obviously
6 had. There certainly are similarities in the claims. There
7 are common issues. There are also very different issues.
8 The bulk of Tranquility's claim was asserted under
9 California State Securities law. They only had a handful of
10 -- of tranches subject to federal law, and as Your Honor is
11 familiar from the opinions and the history of that matter.

12 Even if we were to look at this through the lens
13 of reconsideration, what the plaintiffs are trying to do
14 here is to -- is to say that the Court's ruling on the
15 Tranquility matter is absolute, final law of the case, never
16 get to look at it again. But that's not what the law of the
17 case doctrine is about, Your Honor.

18 The law of the case doctrine is about when a
19 matter is -- is kind of firmly settled, that it's going to
20 govern for the rest of the case. There is no conceivable
21 way that the Tranquility matter could be considered resolved
22 or settled as a matter of law. We had a timely motion for
23 reconsideration of the Court's decision pending, which the
24 creditors' committee had filed and which the debtors had
25 joined. That matter was pending when we reached a

1 compromise to resolve the Tranquility claim.

2 But the issues that were raised in the
3 reconsideration motion had not been adjudicated. That
4 motion was still pending. The MBS plaintiffs intervened in
5 that motion so that they could be heard on it, on the merits
6 presumably because if all they were going to do is step up
7 and say, too little, too late, Your Honor, that's certainly
8 an argument that Tranquility could have and -- and I'm sure
9 would have made had we -- had we litigated that motion
10 before -- before settling the claim.

11 So the matter is not settled. The motion for
12 reconsideration remains pending and there is absolutely no
13 reason that the Court should not address that -- that is,
14 should it reach the subordination issues, there is no reason
15 that the Court should not address it in full and address all
16 the substantive issues that -- that are before the Court.

17 Even if the Court were to look at it through the
18 lens of reconsideration, our argument, Your Honor, is that
19 the Court's decision on -- on subordination is -- falls into
20 the category of a clear error of law that ought to be
21 corrected, and it's obviously with -- with all due respect
22 to the Court that -- that we suggest that.

23 You know, having read the opinion when it came
24 down and the Court's reasoning, it became apparent to the
25 creditors' committee and to the debtors that -- that

1 Tranquility had led the Court to an incorrect decision as a
2 matter of law and that it was really incumbent on us, on
3 behalf of the estate, to raise that and -- and make sure
4 that we put before the Court all the information necessary
5 so that -- so that -- in our view it was an error and if the
6 Court concluded it was an error, it would have the benefit
7 of all -- all the reasoning and rationale before it before
8 that decision became final.

9 The fundamental left turn that we think
10 Tranquility made in its analysis and -- and ended up in the
11 Court's opinion was the distinction between issuer and
12 issuing entity. And this becomes clear in looking at the
13 MBS plaintiffs' amended complaint in the -- in the Western
14 District of Washington action as well as their amended proof
15 of claim asserted here.

16 In the very beginning of the amended complaint,
17 the plaintiffs talk about their action on -- on securities
18 issued and served by -- by WaMu Capital, the underwriter, in
19 conjunction with the depositors of the -- of the mortgage
20 assets into the trusts: The Washington Mutual -- excuse me
21 -- WaMu Asset Acceptance Corporation and Washington Mutual
22 Mortgage Securities Corporation.

23 That filters through into the amended proof of
24 claim that they've asserted here where it alleges quite
25 clearly in Paragraph 134 -- it takes a while to get to it.

1 But in 134 they make it, you know, quite clear the
2 allegation that -- that WaMu Asset Acceptance Corporation
3 served as the issuer of the mortgage-backed securities that
4 -- that the plaintiffs purchased.

5 It becomes even clearer in looking at the -- at
6 the complaint as a whole; that is, in the Western District
7 of Washington the plaintiffs didn't sue the trusts. They
8 didn't sue the trusts at all. They sued Washington Mutual
9 Asset Acceptance, Washington Mutual Capital Corporation.
10 Their claim; that is, their fundamental allegation that
11 there has been illegality in the issuance of the securities
12 that they purchased, that claim is one that is asserted
13 against, among other entities, the depositor, not the trust.

14 And the reason for that is -- is because of -- of
15 the principles under the securities law that we have -- that
16 we have laid out -- the creditors' committee laid out in its
17 motion to amend and we have incorporated into our response
18 to the -- to the pending motion for a determination that --
19 that plaintiffs have filed for a determination that this
20 claim is essentially not subject to subordination. What
21 they're really seeking now in the pending motion is a
22 declaration that -- that their claim is not subject to
23 subordination as a matter of law.

24 And, you know, we've looked at that and concluded,
25 much for the same reason that we did in -- in conjunction

1 with Tranquility where we went ahead and Tranquility had
2 objected and -- and said that, no, you shouldn't deal with
3 subordination now, Your Honor. We asked the Court to
4 address subordination and for the same reason that we did in
5 conjunction with Tranquility, we think it's appropriate for
6 the Court to -- to address it here and now should it --
7 should it reach the issue and not resolve it based on the --
8 on the stipulation.

9 So -- so what's the error in the Tranquility
10 analysis and why should -- should the result that the Court
11 reached in the Tranquility opinion not pertain here?

12 The real issue, obviously, goes back to 510(b) as
13 it must. What we're -- what we're talking about is
14 fundamentally a question of statutory interpretation and
15 Section 510(b) says that -- that we subordinate a claim that
16 arises from the purchase or sale of a security of the debtor
17 or an affiliate of the debtor. It doesn't say a security
18 for which the debtor or the affiliate is the issuing entity.
19 It says, a security of the debtor or an affiliate of the
20 debtor.

21 And the problem is this distinction, this
22 artificial distinction that says, well, if it's a security
23 for which the affiliate is the issuing entity, then -- then
24 no subordination. If it's a security for -- if it's a
25 security of an entity that's the issuer, then -- then, yes,

1 subordination. And it's that distinction, that fundamental
2 distinction that we think is the -- is the error.

3 We have a situation here where the securities laws
4 provide quite unambiguously that -- that the issuer of
5 mortgage-backed securities is the depositor that deposits
6 the mortgages into the trust. The trust is merely a
7 conduit. The trust holds the mortgages, distributes the
8 principal and interest payments, works with the servicer to
9 make sure the mortgages get serviced. But it's really a
10 conduit entity, and it's the -- it's the depositor, for
11 securities law purposes, that's the issuer. It's the
12 depositor who is involved in the issuance of the security
13 and it's the depositor who the plaintiffs have asserted is
14 responsible for illegality in the issuance of the -- of the
15 securities.

16 Your Honor's opinion discussed the circumstances
17 of, well, let's think of the debtor or the affiliate was
18 just an underwriter or a broker and all it did was sell
19 stock of some third party company. I think Your Honor used
20 Apple --

21 THE COURT: Uh-huh.

22 MR. STROCHAK: -- in the decision. So -- so why
23 should this be any different. And the reason why it's
24 different, Your Honor, is because of the securities laws and
25 because we're dealing with mortgage-backed securities here.

1 This is not a situation where -- where we have
2 truly a -- a completely third party security that has
3 nothing to do with -- with either the debtor or the
4 affiliate. This is -- this is mortgage-backed securities.
5 We live under a different regulatory regime that -- that
6 concludes that it is the depositor that is the issuer of the
7 security.

8 So while it's undisputed that Apple would be
9 completely unrelated to this estate in the hypothetical, the
10 same conclusion cannot be reached as to -- as to the issuer
11 of the securities for securities laws purposes. And the
12 issuer -- excuse me -- the issuer under securities laws, the
13 depositor, Washington Mutual, WaMu Asset Acceptance
14 Corporation is undisputedly an affiliate of the debtor in
15 this case. I don't think the plaintiffs have disputed that
16 and I think it's -- it's quite clear from the record that --
17 that that's the case.

18 So we have a situation where under the securities
19 laws WaMu Asset Acceptance is the issuer. It is the one
20 charged with responsibility for ensuring that the issuance
21 of the securities is legal. The plaintiffs are asserting
22 claims in -- in the Western District of Washington against
23 WaMu Asset Acceptance, and WaMu Asset Acceptance is
24 indisputably an affiliate of the debtor at the time of the
25 issuance of the securities.

1 So when you add all that up, we end up with a
2 situation that quite clearly demonstrates that the Court's
3 conclusion that -- that neither the debtors nor their
4 affiliates are issuers in -- in reaching its decision on
5 subordination, and that's a quote from Page 20 of the
6 Court's -- of the Court's opinion. But that seems to us to
7 be quite contrary to what the securities laws provide and --
8 and we think leads inevitably to the result that these
9 claims, the MBS amended claim, must be subject to
10 subordination under Section 510(b) should we -- should we
11 get to the subordination issue on the -- on the merits.

12 I've struggled, Your Honor, and I can't find any
13 principal basis to come to the conclusion that the purposes
14 of Section 510(b) would be served any differently or there
15 should be any distinction between whether a claim is
16 asserted against an issuing entity or an issuer. I don't
17 see any principal basis to make a distinction why the
18 policies of Section 510(b) would be applied any differently
19 to -- to a claim whether it's -- whether it's against the
20 issuer or whether it's against the issuing entity of the
21 securities. It just doesn't make any sense to me under
22 510(b), and I've searched and scoured the case law and the
23 commentary for a rationale why they would be treated any
24 different and I -- and I simply can't -- I can't find any,
25 nor have the plaintiffs articulated any.

1 The real issue is -- is as Slane and Kripke (ph)
2 made clear and all the rest of the commentary and much of
3 the case law makes clear is, you know, are we in a situation
4 where the risk of illegality in the issuance of the security
5 should be shifted in some way. And it -- it seems, you
6 know, patently clear here that -- that where the code very
7 specifically provides that -- that we subordinate not just
8 claims associated with the purchase or sale of equity
9 securities, but also debt securities. That's perfectly
10 clear from the statute. Your Honor has already ruled that
11 way in connection with the WMB bondholders' disputes.

12 Where the statute makes the distinction between
13 equity securities and debt securities and where the statute
14 clearly provides that subordination is applicable to
15 securities of affiliates as well as securities of the
16 debtor. We are not in a world where we are talking about
17 who bears the risk of illegality of issuance as between --
18 as between the purchasers of the securities and equity
19 holders of -- of the company as you would be in a
20 traditional, you know, stock subordination argument.

21 This is not that circumstance. This is the
22 circumstance where we're talking about the risk of
23 illegality in issuance and whether a claim should be treated
24 pari passu with general creditors of the estate or whether
25 it should fall below general creditors of the estate.

1 And for all the same reasons that -- that
2 subordination is there, we have a situation here where the
3 plaintiffs have a separate set of assets. Their rights are
4 the mortgage-backed securities and the mortgages that
5 provide principal and interest payments for those securities
6 where those assets are separate, where -- where there is no
7 assertion whatsoever that those assets would be available
8 for distribution to general creditors of the -- of the
9 holding company estate. Those assets are gone from the
10 system so to speak. They're in the trust and the general
11 creditors of the estate have no access to those, nor do they
12 have any right of upside in the value that the -- that the
13 plaintiffs acquired when they bought their securities.

14 If the mortgage-backed securities that they
15 acquired did really well, if they had been underpriced in
16 the market, if they had been purchased for 100 cents on the
17 dollar and the market value increased to 105 cents -- I'm
18 just -- I'm just pulling a hypothetical here -- that
19 increase in value would have been solely for the plaintiffs
20 to -- to enjoy. It would not have gone back to creditors of
21 the estate in any way, shape, or form.

22 So for all the same reasons that you would
23 subordinate claims relating to the purchase or sale of
24 equity securities, it's equally applicable here because they
25 enjoyed -- the plaintiffs enjoyed all of the upside here.

1 Just like the acquirer of stock would enjoy all the upside
2 in the value of the company, the acquirer of these
3 securities enjoyed all the upside in the value of the
4 mortgage-backed securities.

5 And for those reasons there -- there simply is no
6 policy basis to distinguish here between a security of an
7 issuer, which is -- which is what we have here, or a
8 security of an issuing entity. We just don't see the basis.
9 And because -- because we do have securities of an issuer,
10 WaMu Asset Acceptance, and because that issuer for
11 securities law purposes is an affiliate of the debtors, the
12 plain language of 510(b) requires -- requires subordination
13 in this case.

14 Let me turn to the reserve just briefly, Your
15 Honor. The plaintiffs are kind of standing general
16 appellate principles on their head with respect to the
17 reserve. The -- there was no assertion or no suggestion and
18 no contemplation in the plan that should the Court conclude
19 that a claim is not in a particular class, that we would
20 have to continue to reserve in that class for the claim.

21 The Court has ample authority to order release of
22 the reserve under the -- under the confirmation order. We
23 have -- we specifically set up the reserve process in a way
24 that we could come back and estimate claims, if we needed
25 to. If we had a claim that was -- that was resulting in

1 prejudice to the parties on account of the reserve, that we
2 could always come back and estimate the claim in order to --
3 in order to address that issue.

4 And the suggestion that we would have to keep the
5 reserve in the wrong class, should the Court rule that the
6 claim is subordinated, until the end of the appeal process,
7 essentially, gives the plaintiffs the right to go off, file
8 appeals. We could go all the way to the Supreme Court and
9 it could take years to get that reserve released. To
10 suggest that the Court is without authority to order the
11 release of the reserve is -- is not consistent with -- with
12 a prompt resolution of the estate or anything else in the
13 plan or the confirmation order.

14 Now, certainly, if -- if the Court decides to
15 release the reserve, the plaintiffs have the right to come
16 back and say, we're going to appeal, Your Honor, and we
17 would like a stay. We would like to maintain the status quo
18 pending appeal. The rules provide an adequate mechanism for
19 that and there's no reason that they should not be required
20 to bond the costs to the estate of maintaining the reserve.
21 And as I've articulated, it cost \$2 million a month to the
22 peers' recovery, \$700,000 overall in increased interest
23 payments by the -- by the estate.

24 And if we get to the point where the reserve is
25 released and the plaintiffs appeal, then this issue can be

1 adequately dealt with in the context of an application for a
2 stay pending appeal, and the Court's determination of what
3 would be an appropriate bond on that -- on that appeal,
4 given the detriment to the estate and other creditors of
5 continuing to hold the reserve.

6 I'll stop there, Your Honor. I know Mr. Johnson
7 probably wants to say a few words on behalf of the
8 creditors' committee, unless you have any questions?

9 THE COURT: No. Thank you.

10 MR. STROCHAK: Thank you.

11 MR. JOHNSON: Good afternoon, Your Honor. Robert
12 Johnson from Akin Gump on behalf of the official committee
13 of unsecured creditors.

14 And before I begin, I would like to disclose that
15 the liquidating trust has engaged Akin Gump for certain
16 limited purposes, including advising the trust advisory
17 board. But I'm here today on behalf of the creditors'
18 committee, the creditors' committee which made the motion to
19 alter, amend the Tranquility decision. We will be filing an
20 amended 2014 statement shortly regarding that other
21 engagement.

22 Also, before I begin, I'm going to make reference
23 to a diagram which comes from the MBS plaintiffs' proof of
24 claim. It's Page 59, Claim 4069. May I approach and hand
25 up a copy?

1 THE COURT: You may.

2 Thank you.

3 MR. JOHNSON: Your Honor, I'll begin with the
4 stipulation and order point. Much has been said on that
5 already, but I just want to highlight a few points.

6 As -- as the liquidating trust has argued, there
7 was no recovery of actual property to Class 18 at the time
8 of the sixth amended plan nor now with the seventh amended
9 plan. And so that's why we see that the stipulation and
10 order that was entered into in November 2010 made sense;
11 that if you were to interpret that stipulation and order as
12 saying that there was already at that time a recovery to
13 allowed subordinated claim, the MBS plaintiffs could have
14 immediately re-filed their claim.

15 It only makes sense in the context of the
16 mandatory subordination of mortgage-backed securities to
17 other bonds that would place them in Class 18 that would
18 then make sense to put off the litigation of the merits of
19 the MBS plaintiffs' claim at that time in November 2010.

20 So we contend that -- that there was -- because
21 there was no recovery at that time, and there has not yet
22 been a recovery to Class 18 at this time, that it's
23 inappropriate for the claim to be filed at this time.

24 The plaintiffs have accused us of playing fast and
25 loose with them with regard to the debating, but it simply

1 isn't so. As the MBS plaintiffs have -- have alleged, as
2 they have argued under Section 1126(g), if they were going
3 to get no recovery, they would have been deemed to reject.
4 They wouldn't have had to vote. They could have stayed in
5 and -- and agreed to be in Class 18, as certain other
6 securities fraud plaintiffs did, and they they could have
7 voted in Class 18. But they choose not to do that.

8 Then when they came back in after the Tranquility
9 decision and they filed their claim, they then, in my
10 opinion, overreached by saying they wanted to be adjudicated
11 to the Class 12 for all purposes, not merely for voting, but
12 for all purposes. And we said at that time, if you want to
13 vote in 12, we're happy to let you vote in 12, but you can't
14 be adjudicated with a -- a shortcut approach. You have to
15 be in Class 12 for all purposes. And on top of that it's
16 quite clear from the stipulation and order that there had
17 been no recovery to Class 18, still there's no recovery to
18 Class 18, and that they belong in Class 18.

19 We also very clearly articulated that we, the
20 creditors' committee, disagreed with the Tranquility
21 decision. We had made the motion to alter or amend on
22 January 3rd and we felt that when the time was appropriate,
23 we would be able to make the arguments to Your Honor to
24 explain why we believed that that Tranquility decision did
25 contain an error of law and fact, and that it would cause a

1 manifest injustice to the creditors who were in Classes 2
2 through 16.

3 As to the issue of whether the claim was to be
4 filed as a Class 12 or as a Class 18, there's just no such
5 thing on a proof of claim. A proof of claim form has a box
6 that you can check if you have a secured claim and it's got
7 a box that you can check if you have a priority claim. But
8 there's no place to put on a proof of claim form that this
9 is only going to be filed a subordinated claim. So there's
10 -- that argument is just a red herring, Your Honor.

11 I would like to move onto the subordination point
12 and to -- to the Tranquility decision.

13 First, the plaintiffs have argued that we don't
14 have an appropriate basis under Rule 59(e) for the motion to
15 alter or amend. And I would like to highlight, Your Honor,
16 this is not a new argument. The creditors' committee has
17 consistently argued that the mortgage-backed securities at
18 issue were the securities of WaMu Asset Acceptance Corp.

19 What happened, however, was during the argument,
20 nobody made reference to Section 2(a)(4) of the Securities
21 Act or Section 3(a)(8) of the Exchange Act. But this is a
22 securities fraud case. The plaintiffs are making a claim
23 under Section 15 of the Securities Act and you have to look
24 at the statute under which a cause of action arises to look
25 at the definitions.

1 And the definitions that are in the Securities Act
2 provide very clearly in Section 204 and in Section 3(a)(8)
3 that the depositor is the issuer. So for purposes of
4 securities fraud, it's the depositor here, WaMu Asset
5 Acceptance Corp., which is the issuer of those certificates,
6 which we then served through the underwriter, WaMu Capital
7 Corp, done through the investors.

8 And you'll see on the bag, ma'am, that the trust
9 is below. The mortgage lines are transferred into that
10 trust and then the certificates transfer up to the
11 depositor. The depositor then transfers those to the
12 underwriter and the underwriter sells them to the investors.
13 So you can see from this arrangement that here -- and this
14 is in the plaintiffs' own proof of claim -- it's the
15 depositor here that's at issue.

16 Your Honor, the Max's Seafood case is a case that
17 we put in our pleading to call to the Court's attention that
18 the Third Circuit has said that if an argument -- that the
19 Court must consider, on a motion to alter or amend, an
20 argument, even if the argument had not previously been made.
21 We had argued that the depositor was the issuer. It's just
22 that those citations hadn't been provided at that time.

23 And I regret that those citations had not been
24 provided to the Court at that time. It certainly would have
25 made things a lot clearer if we had provided citations to

1 2(a)(4), 3(a)(8), Securities Rule 191, Rule 3(b)(19) and
2 Regulation AB. Believe me, Your Honor, I did a lot of
3 homework between December 20th of 2011 and January 3rd when
4 we filed our motion to alter or amend.

5 But, unfortunately, Your Honor, in -- in the
6 Court's decision with the sentence that says, "neither the
7 debtors nor their affiliates are the issuers of the
8 certificates," and that is the error that we wanted to call
9 to the Court's attention because under the securities laws,
10 which is at issue for a securities fraud case, it's the
11 depositor that is the issuer, and that is WaMu Asset
12 Acceptance Corp.

13 Now this is also what distinguishes this case from
14 SemCrude that Judge Shannon decided. In SemCrude what Judge
15 Shannon had before him was a limited partnership and he
16 looked correctly at the Bankruptcy Code and said that the
17 definition of affiliate did not include a limited
18 partnership.

19 But here, the definition of an affiliate under the
20 Bankruptcy Code clearly does include a corporation that is
21 owned by WaMu Bank and that, in turn, is owned by WaMu, Inc.
22 So here we do fall within the definition of an affiliate and
23 that is what distinguishes us from the SemCrude decision.

24 It also distinguishes us from the analogy of Apple
25 stock because what we have here in this diagram shows that

1 what -- what we have are mortgages that were originated by
2 WaMu Bank, transferred down to this depositor, and then
3 there was the securitization process to the investors.
4 That's a far cry from a situation in which WaMu Capital Corp
5 might be buying the stock of a completely unrelated entity.
6 These are related entities as shown in the diagram that the
7 MBS plaintiffs provided. And that shows why it's so
8 different from Apple stock.

9 I would also like to point to the issue of the
10 equity risk and the policy arguments that were made by the
11 parties and by the Court with respect to 510(b). And what's
12 important here is that it's not a question of acquiring an
13 interest in the affiliate of the debtor when you're talking
14 about a bond as opposed to a stock.

15 So just as those people who purchased the bonds of
16 WaMu Bank did not acquire an equity interest in WaMu Bank,
17 and yet their bonds were subordinated. The Court properly
18 found that bonds that were issued by this entity, WaMu Bank,
19 which is an affiliate of WaMu, Inc, those are subordinated
20 with respect to WaMu, Inc's creditors. They are
21 subordinated to the creditors of WaMu, Inc. So it's not a
22 question of the equity interest in that entity. It's a
23 question of the bond being subordinated to other bonds.

24 I would like to speak about the harm to the estate
25 and to the creditors. As the liquidating trust has pointed

1 out, the clip of 435 million in reserve at the federal
2 judgment rate gets to \$700,000 a month, and so that's a true
3 out-of-pocket expense to the liquidating trust. Of course,
4 the peers suffer even more because due to their contractual
5 pay-over requirements, they have to pay up to the more
6 senior creditors, and so with respect to them, the cost is 2
7 million a month.

8 Your Honor, there may have been a mistake with
9 respect to the citation or the lack of citation of the
10 particular elements of the law and the prior arguments that
11 were made, but there's no reason why that mistake now should
12 inure to the detriment of these creditors.

13 I would also like to address the issue of the
14 reserve. It simply makes no sense to require a reserve of
15 cash if the Court determines -- which we respectfully submit
16 the Court will after considering our arguments and our
17 provision of the authority regarding the Securities Act and
18 the regulations. It simply would make no sense to reserve
19 cash for a claim that, as a matter of law, must be a
20 subordinated claim.

21 We think that what would make sense would be that
22 when we got to the point that liquidating trust interests
23 were being distributed to other allowed subordinated claims,
24 if at that time the MBS plaintiffs' claim is still
25 contingent, if it's still undetermined, if it's still

1 unliquidated, then there could be a reserve of liquidating
2 trusts' interests in the tranche that corresponds to Class
3 18 at that time. But there's no reason to hold up \$435
4 million in cash which should be distributed to holders of
5 claims in Classes 2 through 16 if there's no possibility
6 that the MBS plaintiffs will end up with a claim that's in
7 Class 12.

8 And so, finally, just to sum up, Your Honor, with
9 respect to law of the case, law of the case, of course, is a
10 discretionary doctrine and, Your Honor, we have made it
11 quite clear from as soon as we -- we received the
12 Tranquility decision through our motion to alter or amend
13 that we disagreed with that. We take the position that the
14 Tranquility decision was not a final decision because we had
15 made the motion to alter or amend and it had not been
16 decided.

17 We also believe that Your Honor should exercise
18 her discretion not to apply law of the case with respect to
19 Tranquility, but to find the law of the case that should be
20 applied here is the law of the case with respect to the bank
21 bondholders. It's that the bonds of an affiliate of the
22 debtor must be subordinated to the other bonds.

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 Reply.

1 MR. SHERWOOD: I'll try to keep my remarks limited
2 to reply.

3 First, Your Honor, let me just reemphasize that
4 the extrinsic facts and circumstances and -- and so forth at
5 the time of entering into the stipulation are irrelevant
6 when the terms of the stipulation are clear; and clearly
7 here they don't address classification; and clearly here
8 they use the word "recovery" as opposed to actual recovery;
9 and clearly here you have the debtor acknowledging that
10 there was a distribution to Class 18 and that Class 18
11 received property.

12 But, Your Honor, if you're going to --

13 THE COURT: Well, I -- I think they said they did
14 not. There was no issuance of litigating trust certificates
15 to Class 18.

16 MR. SHERWOOD: They said that, but as a matter of
17 law Your Honor can and should find that Class 18 received
18 property under the plan because that's what would have to
19 happen in order for Class 18 to vote and not be deemed to
20 reject under Section 1126.

21 And, furthermore, Your Honor, it's really in black
22 and white in the debtors' plan. The debtors' plan says that
23 Class 18 is impaired and receiving distributions pursuant to
24 the plan. That's a recovery. A distribution is a recovery
25 and property is a recovery. And for them to start splitting

1 hairs now on what the meaning of a recovery is in order to
2 keep us from filing our proof of claim --

3 THE COURT: Well, I'm -- I'm not sure anybody in
4 Class 18 would say that they've gotten a distribution or any
5 recovery as of today.

6 MR. SHERWOOD: Okay. Your Honor, that raises
7 another good point.

8 First of all, at the time of the stipulation, the
9 plan that was on file at that point in time was not
10 confirmed. And more importantly, Your Honor, at that time
11 the plan that was on file, and I think the second -- which
12 was not confirmed, and I think the second plan that was not
13 confirmed did not provide for the substantial return to
14 equity that the seventh amended plan provides.

15 So that is an additional fact and circumstance
16 that the Court should consider. If you think about it, if
17 you want to go back and try to figure out what the facts and
18 circumstances were back in November of 2010, there was no --
19 there -- there's 100 million-plus of return to equity under
20 the seventh amended plan.

21 THE COURT: Why is that relevant?

22 MR. SHERWOOD: Because from the perspective of
23 Class 18, a return to equity is very relevant. A 100
24 million -- if I'm sitting in Class 18, Your Honor --

25 THE COURT: Okay.

1 MR. SHERWOOD: -- and I see no -- a contingent
2 recovery to my -- my constituency, my claim.

3 THE COURT: Yeah.

4 MR. SHERWOOD: Yet, I see below me a 100 million-
5 plus recovery to equity, that's -- that's very important
6 from the perspective of a Class 18 holder.

7 THE COURT: And they voted.

8 MR. SHERWOOD: Who voted?

9 THE COURT: Class 18.

10 MR. SHERWOOD: Class 18 voted and I think, Your
11 Honor, if you look at Class 18, each and every member of
12 Class 18 who voted got some other type of plan consideration
13 under this plan. They got -- you take Tranquility, okay.
14 Tranquility got like a nine-million-dollar Class 18 claim,
15 but they also got a nine-million-dollar Class 12 claim
16 provided they vote in favor of the -- of the plan.

17 You look at it -- there was another group. They
18 got their counsel fees paid provide -- and, again, provided
19 they vote in favor of the plan. And then there was Mr.
20 Stark's clients who was -- was thrown a Class 18 claim along
21 with substantial other consideration provided they vote in
22 favor of the plan.

23 So, yeah, they voted and we didn't vote in Class
24 18 because -- because Your Honor had decided Tranquility.
25 They had indicated that --

1 THE COURT: Well, you indicated you wanted to vote
2 in Class 12.

3 MR. SHERWOOD: Correct. But at the same time,
4 Your Honor, we indicated that if we were not going to be in
5 Class 12, it would be nice for us to learn that that was the
6 case before we voted. And, Your Honor, we -- we pressed
7 that issue. We pressed that issue on multiple occasions and
8 -- for the -- for the exact reason that we didn't want to be
9 standing here today saying, Judge, we voted Class 12 and
10 they're trying to put us in Class 18 under this stipulation,
11 and because they want to overrule Tranquility --

12 THE COURT: But I overruled you on that. I did
13 not decide the classification or amount of your claim for
14 anything other than purposes of voting. And all parties
15 rights were reserved to argue that.

16 MR. SHERWOOD: That's right. I'm not -- that
17 happened and -- and it happened over my -- over my
18 objection.

19 But it -- but I think it's something that I would
20 -- would hope that the Court would consider at this point in
21 time because I don't -- I don't think I would have done it
22 any other way, even looking back. Your Honor had decided
23 Tranquility. If -- I mean, what gets me about it, Your
24 Honor, the change of position is what they're saying here is
25 that this -- that this trigger has not occurred, and they

1 could have said that before confirmation. They could have
2 asked Your Honor --

3 THE COURT: I think they did say.

4 MR. SHERWOOD: They could have asked Your Honor to
5 reconsider and rule whether you're going to reconsider
6 Tranquility before confirmation.

7 THE COURT: but -- but they didn't. They had a
8 lot of other things going on and the whole purpose really of
9 the stipulation was to not decide those issues. Wasn't that
10 the purpose of the stipulation?

11 MR. SHERWOOD: No. Not from our perspective.

12 THE COURT: Well --

13 MR. SHERWOOD: Your Honor, the purpose of the
14 stipulation, the solicitation procedures -- I mean,
15 basically, what we did is we followed the procedures that
16 were set forth by the debtor to a T. And they said if you
17 have filed a proof of claim and you want to allow that claim
18 not just for voting purposes, but also for classification
19 purposes to file a motion, which we did, and we filed a --
20 we said -- we contend that we have a Class 12 claim for like
21 two-hundred-and-some-million, then we amended it to the 435.
22 And it was incumbent upon the debtor at that point and the
23 estate, if they had a clear view -- I'm just -- I'm just --

24 THE COURT: I know what your argument was, but I
25 did overrule you on that point.

1 MR. SHERWOOD: Okay. So let's -- let's get --

2 THE COURT: Where we are today.

3 MR. SHERWOOD: Okay. We -- just on that point and
4 -- and we voted in Class 12, but I think the Court should be
5 cognizant of the fact that had we voted in Class 18, the
6 debtor would have -- the debtors' plan would have been in
7 serious jeopardy because of the absolute priority rule. And
8 -- and this was, to some extent -- not to some extent, but
9 clearly gainsmanship on their part to put us in Class 12 at
10 one point and then flip-flop later.

11 Your Honor, we relied on -- we relied on our Class
12 12 status in -- in exercising our rights pursuant to the
13 plan and -- and there should be some finality at
14 confirmation with respect to our treatment as a Class 12
15 creditor.

16 Let -- let me -- let me turn to the reserve issue.
17 Again, the debtor drafted the plan. The debtor drafted the
18 confirmation order. The terms of the plan are clear. They
19 provide that to the extent that there is any dispute with
20 respect to this or -- or that the order disallowing this
21 claim is not resolved by a final order, the reserve has to
22 stay in place. And the confirmation order and the plan
23 should be enforced as written, again, by the estate. And --
24 and there's no reason to -- to deviate from that.

25 THE COURT: I understand.

1 MR. SHERWOOD: Getting -- getting to Tranquility,
2 the standard for reconsideration is manifest injustice and
3 it has to be -- the error has to be apparent to the -- to
4 the point of being indisputable. And, again, I think if you
5 look at their brief on Page 18 where they cite to SEC Rule
6 191 and the definition of -- of "issuer" and the bold part
7 at the top of Page 18. It says that the depositor for an
8 asset-backed securities acting solely in its capacity as
9 depositor to the issuing entity is the issuer for purposes
10 of the asset-backed securities of that issuing entity.

11 And then the same language is at the last part of
12 Paragraph A in Paragraph 34 that's in bold. And I think
13 this -- this really highlights that even the SEC rules
14 recognize a distinction between a depositor in an issue and
15 the issuing entity, just like Your Honor did in Tranquility.
16 And I think that that philosophy, that rationale, is still
17 good.

18 And, you know, in terms of the basis for that, I
19 think, Your Honor, that there was that Slane and Kripke
20 article that you cite in Tranquility and I think it's clear
21 that the purpose of Section 510(b) is to guard against
22 having someone who is an equity holder in the debtor or in
23 an affiliate of the debtor being elevated to -- to the
24 position of a creditor, and that's not what's happening
25 here.

1 And then finally on Tranquility, Your Honor, the
2 reported entity, the issuer, the depositor and -- and, you
3 know, all of the entities in -- in the chart that was handed
4 up by counsel to the committee, they are all included within
5 these SEC definitions really to expand liability and
6 reporting. And just because the SEC -- just because some --
7 there is a claim under SEC law, that doesn't mean that that
8 law that governs that claim is suddenly going to govern a
9 bankruptcy court's analysis under Section 510. And 510
10 purposes -- 510 has a completely different purpose and --
11 and Your Honor is -- and there's nothing manifestly long or
12 grossly unjust about what -- what Your Honor's rationale was
13 in Tranquility.

14 So, Your Honor, you know, based on all that we --
15 we think that -- that the language of the stipulation is
16 clear and there has been a recovery under the plan to Class
17 18, which is a class that's receiving property and
18 distributions for sure. And a contingent right of recovery
19 is no less a recovery than an actual right. And it wouldn't
20 make sense, also, Your Honor, to read the stipulation to
21 wait for actual cash to come in -- into hand because that
22 would be -- you know, at that point in time we don't know
23 what the facts and circumstances would be. And, moreover,
24 we're in Class 12 anyway so it just doesn't make sense.

25 So for those reasons, Your Honor, and really just

1 before I sit down I think it -- it would be unjust for Your
2 Honor to allow the debtor and the committee to sort of play
3 the game that they did by putting us in Class 12 and sort of
4 laying down for voting purposes when they knew full well all
5 alone -- all along that they were going to change their
6 tune. I think that's playing fast and loose with the Court,
7 certainly with me and our clients who, you know, deserve to
8 have a day on the merits of their claim. And -- and that's
9 all we're seeking here. We're not seeking a four-hundred-
10 and-thirty-five-million-dollar allowed claim. We just want
11 to know that we're in Class 12.

12 Thank you.

13 MS. KASWAN: Your Honor, could I just speak to
14 some issues --

15 THE COURT: Okay.

16 MS. KASWAN: Counsel did address back to what hard
17 work we did in --

18 THE COURT: All right.

19 MS. KASWAN: Your Honor, I'm not a bankruptcy
20 lawyer. I'm a securities lawyers. And -- and that's why I
21 wasn't speaking, certainly, in the first part of this
22 argument. But the securities laws, both Section 11 and
23 Section 10(b)(5) are disclosure statutes. They -- they
24 don't turn on who owns the securities. They turn on who is
25 the speaker. And in connection with Section 11, ordinarily,

1 the issuing entity and the issuer are the same. They are
2 the ones who file the statements with the Court. They are
3 the speakers.

4 And so Section 11 imposes liability if the
5 disclosures are false or misleading. And that would be
6 ordinarily on the entity that files the disclosure
7 statements, the officers who sign the disclosure statements,
8 and the underwriters who sell the securities. That's a very
9 different concept than Section 510(b) which looks to the
10 entity that owns the securities or in connection with the
11 bond, the entity whose collectability and resources the
12 debtors are looking to for repayment of the bond.

13 So that's why, you know, I believe that the
14 regulation is irrelevant to the issue of a 510(b) question
15 and, also, the securities law for interpretation of Section
16 11 and the issue of who is liable under the disclosure
17 statutes is irrelevant to subordination under 510(b). Both
18 of those statutes are directed to different concepts.

19 And certainly, you wouldn't say, for example, that
20 WMI and the officers are affiliates even though the
21 affiliates are speakers and, therefore, liable under Section
22 11, and WMI could be liable as a control person under
23 Section 15 for the false statements by the officers. That's
24 what's happening here is that because the depositor is the
25 manager and the speaker, they are liable under Section 11;

1 that is wholly unrelated to the question of whether or not
2 they are the owner of either the stock or the bonds that are
3 being issued that -- the owner of the bonds or the issuing
4 entity. And so that's why that's the appropriate entity to
5 look to under 510(b).

6 THE COURT: Thank you.

7 MR. JOHNSON: Your Honor, very briefly on the
8 point that Ms. Kaswan just made. I think she hit the nail
9 right on the head. The question of the securities laws is
10 who is the speaker and the question under the Bankruptcy
11 Code is what is the definition of an affiliate.

12 Now where that intersects is right here on this
13 chart. I just drew a circle around all the entities that
14 are corporations and the ones that are affiliates.
15 Washington Mutual Bank is an affiliate of WMI because it's
16 one-hundred percent owned by WMI. WaMu Asset Acceptance
17 Corp. is one-hundred percent owned by Washington Mutual
18 Bank, and under Section 101 of the Bankruptcy Code, that
19 means that WaMu Asset Acceptance Corp. is an affiliate.

20 And as Ms. Kaswan correctly pointed out, the
21 securities laws do look to who is the speaker in order to
22 determine where there is liability. And the basis of their
23 lawsuit in Washington and their claim here is securities
24 fraud against WaMu Asset Acceptance Corp. It's not against
25 the trust, which merely held those mortgages.

1 So here we now have the intersection of the
2 securities law providing the definition of what is the
3 issuer and the Bankruptcy Code providing that if the issuer
4 is an affiliate, then it -- it then matches the definition
5 of what is an affiliate and, therefore, it needs to be
6 subordinated under Section 510(b).

7 Thank you.

8 THE COURT: Thank you.

9 MR. STROCHAK: Thank you, Your Honor. Adam
10 Strochak. Just -- just two very brief points.

11 Mr. Sherwood, I think, quoted from Section 22.1 of
12 the plan, the treatment of subordinated claims, and he left
13 out the key language. The plan says that "Commencing on the
14 effective date and in the event that all allowed claims and
15 post-petition interest claims in respect of allowed claims
16 are paid in full, then each holder of an allowed
17 subordinated claim will get liquidating trust interests."

18 That's the key language. The way the plan works
19 is that until the waterfall fills up, there is no
20 distribution of liquidating trust interests to -- to the
21 holders of allowed subordinated claims.

22 The latter point I'll just echo what -- what Mr.
23 Johnson said and perhaps put a little different slant on it.

24 You know, we -- we agree that the SEC rules do
25 make a distinction between issuer and issuing entity. And

1 the key point, the whole -- the whole argument that we've
2 made is that -- is that Section 510(b) doesn't make that
3 distinction. There is no principal basis to make a
4 distinction between issuer and issuing entity in connection
5 with mortgage-backed securities.

6 And as Ms. Kaswan stated, you know, we're a little
7 bit out of the ordinary here. This is not the ordinary
8 situation where the issuer is both the entity and the
9 speaker, as she -- as she put it. We're in a situation
10 where -- where those were separated.

11 But what rational basis is there under 510(b) to
12 say that, well, a claim against one would be subject to
13 subordination, but a claim against another would not. If --
14 if the -- if the allegation is that there was illegality in
15 the issuance of the securities, then -- then there's no
16 reason to say that a claim against the issuer would not be
17 subject to -- that is, a claim relating to securities of the
18 issuer would not be subject to subordination as long as the
19 issuer is an affiliate, and plainly in this case it was.

20 Thank you, Your Honor.

21 MR. ETKIN: This has been very difficult for me to
22 just sit through --

23 THE COURT: All right. So --

24 MR. ETKIN: So with the Court's indulgence just
25 two minutes.

1 THE COURT: Two minutes.

2 MR. ETKIN: First of all, I think we have a basic
3 disagreement as to what provisions of the plan to -- to look
4 to to determine --

5 THE COURT: You have to identify yourself for the
6 record.

7 MR. ETKIN: I'm sorry, Your Honor. Michael Etkin,
8 Lowenstein Sandler, bankruptcy counsel to the MBS
9 plaintiffs. My apologies.

10 We're -- we're looking at different plan
11 provisions. Your Honor, I think that Section 30.2 of the
12 plan which Mr. Sherwood pointed out earlier, and which has
13 not been the subject of comment by either the post-
14 confirmation trust or the committee, says clearly and
15 unequivocally that -- that Class 18, along with other
16 classes, are receiving distributions pursuant to the plan.
17 You can't -- you can't talk your way around that, Your
18 Honor.

19 THE COURT: Well, you can if you look at the
20 actual language of whether they're getting distributions.

21 MR. ETKIN: But, Your Honor, the debtors -- the
22 debtors admit in the context of the plan that they're
23 getting distributions. That's an admission. That's clear
24 and unequivocal. They can't now say, well, we didn't mean
25 it. They can't now say, well, you know, we -- we really

1 meant that it was non-contingent distributions. It says
2 what it says and it's clear. So from our perspective, Your
3 Honor, that really resolves the issue.

4 And then one point on this Tranquility argument,
5 which -- which Mr. Strochak just talked about. The fact
6 that there's no reason or no basis under 510(b) to
7 distinguish between the issuer and -- and the issuing
8 entity. Well, the SEC makes that distinction. They don't
9 make that distinction. 510(b) doesn't talk about
10 securities, doesn't talk about an issuer. 510(b) talks
11 about securities, whether equity or debt, of the -- of the
12 debtor or an affiliate of the debtor.

13 Now we're arguing as to who they think an
14 affiliate of the debtor is. The fact is that the -- that
15 the securities, the asset-backed securities are securities
16 of the issuing entity. Now why do I say that? Because
17 that's what the SEC rule says. It says that -- that the
18 depositor is considered the issuer for all of those issues
19 relating to reporting because they're the ones who have the
20 information and they're the ones who would stand liable for
21 misstatements with respect to that information.

22 But the rule goes further and it says, as -- as
23 the debtors quoted in their -- in their objection, it says
24 that the depositor to the issuing entity is the issuer for
25 purposes of the asset-backed securities of that issuing

1 entity. That parrots the language of 510(b). The
2 securities are of the issuing entity. They're not
3 securities of the issuer. The assets of the issuer,
4 performance of the issuer have nothing to do with the
5 investment that was made.

6 This all makes perfect sense, especially when you
7 look at the background of 510(b) which has been appended to
8 tell the investor that you can't jump the line simply by
9 asserting a litigation claim if you bought securities of the
10 debtor or of an affiliate of the debtor. By virtue of the
11 SEC's own language, these were asset-backed securities of
12 that issuing entity. That issuing entity was not an
13 affiliate. 510(b) does not apply.

14 Thank you, Your Honor.

15 THE COURT: All right. No more. I'll tell you
16 what I am going to decide today.

17 First of all, the trigger has not occurred for
18 purposes of the stipulation. There has been no recovery on
19 Class 18 simply by confirmation of the plan or by the fact
20 that the debtor allowed that class to vote. The reality is
21 there has been no distribution of any property, cash,
22 liquidating trust certificates, or anything to Class 18.
23 The stipulation provided that no claim would be filed until
24 that time and, therefore, the claim is premature.

25 With respect to the reserve, therefore, since

1 there is no pending claim, no reserve need be provided by
2 the debtor in cash or in liquidating certificates.

3 With respect to the issue of whether there was an
4 agreement that they would only file a Class 18 claim, there
5 is nothing in the stipulation that says that. So at the
6 time of the trigger, they are free to file a Class 12 claim.

7 With respect to the applicability of the
8 Tranquility decision, I don't think the MBS plaintiffs can
9 rely on that. It was not a decision with respect to their
10 claim. The claims are different. In addition, it was not a
11 final decision at all because of the pendency of the motion
12 for reconsideration. I did not get the chance to address
13 that motion or make any ruling on those arguments. So,
14 quite frankly, it is not law of the case. If it were, I
15 would exercise my discretion not to apply it to this claim.

16 But I think it's not necessary for me to decide
17 the merits of that argument at this time because I think
18 that the MBSA -- MBS plaintiffs do not have the right to
19 file or prosecute a claim now and won't have that right
20 until the -- any recovery is had on the Class 18 claims, and
21 that means a -- an actual distribution.

22 Okay.

23 MR. STROCHAK: Your Honor, I think it quite makes
24 sense for us to reduce your ruling to an order, circulate it
25 to plaintiffs and then submit it under certification.

1 THE COURT: Okay.

2 MR. ROSEN: Thank you very much, Your Honor.

3 THE COURT: We're done with the agenda, then?

4 MR. ROSEN: That is the agenda, Your Honor.

5 MR. SHERWOOD: Thank you, Your Honor.

6 MR. ETKIN: Your Honor, I think there's one more
7 thing on the agenda, which was the least -- and it could be
8 handled quickly, I guess, but it -- there was a status
9 conference in connection with the certification motion. I
10 don't know that there's much to be said right now. I'm --
11 given the length of the argument on the certification, I'm
12 not going to get into arguments on the objection filed. We
13 can do that in reply papers prior to a scheduled hearing on
14 the merits.

15 With respect to timing, and I think one of the
16 issues that the debtors -- that the debtors raise is that
17 issue. I guess we can talk to the debtor about that and see
18 whether we can reach some agreement, or we can advise the
19 Court and put it on for substantive hearing at -- at some
20 omnibus hearing date in the future.

21 THE COURT: I think you should talk about whether
22 or not we -- and when we have it.

23 MR. STROCHAK: We'll do that, Your Honor.

24 MR. ETKIN: We will discuss that, Your Honor.

25 THE COURT: All right.

1 All right. We'll stand adjourned, then.

2 MR. STROCHAK: Thank you, Your Honor.

3 MR. ROSEN: Thank you.

4 MR. SHERWOOD: Thank you.

5 (Whereupon, the proceedings concluded at 1:16 p.m.)

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10 of Tranquility Master Fund, Ltd. -- --

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12 Motion of Washington Mutual, Inc. for

13 an Order, Pursuant to Section 105(a)

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16 Procedure, Approving Stipulation and

17 Agreement By and Among Washington

18 Mutual, Inc., JPMorgan Chase Bank,

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u/d/o August 31, 2001, et al.

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Debtors' Seventy-First Omnibus

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(Substantive) Objection to Late

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Filed Claims

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Debtors' Seventy-Second Omnibus

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(Substantive) Objection to Claims

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of the United States Bankruptcy Code

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Washington Mutual, Inc. v. XL Specialty

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C E R T I F I C A T I O N

I, Sherri L. Breach, CERT*D-397, certified that the
foregoing transcript is a true and accurate record of the
proceedings.

Sherri Breach
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